

TREASON UNMASK'D:

OR THE

QUEEN'S TITLE,

THE

REVOLUTION,

And the

Hanover Succession

VINDICATED.

Against the TREASONABLE POSITIONS, of
a Book lately Publish'd, Intitl'd,

*The Hereditary Right of the Crown of England asserted;
the History of the Succession since the Conquest clear'd,
and the true English Constitution vindicated, from the
Misrepresentations of Dr. Higden's View and Defence.*

BEING

AN ABSTRACT of the said Book;

With

REMARKS wherein the Treasonous Assertions and Suggestions contain'd in it, are expos'd and confuted.

L O N D O N :

Printed, and Sold by the Booksellers of London and
Westminster. 1713.

Rapin
xviii. 131.

THE ASSOCIATION

OF THE

QUEEN'S TOWN

THE

REVOLUTION

AND

THE ASSOCIATION



THE ASSOCIATION

THE ASSOCIATION

THE

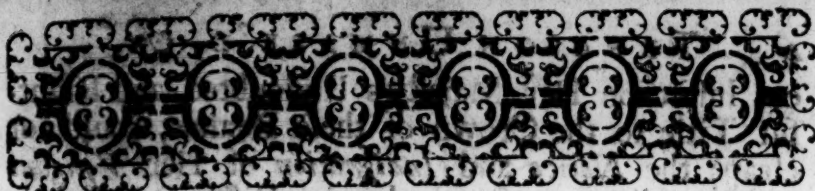
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TREASON UNMASK'D,

OR,

The QUEEN'S TITLE, the REVOLUTION,
and the HANOVER SUCCESSION Vin-
dicated, &c.



THE CRISIS is come at last: The Snake lies no longer in the Grass; The bold Dragon rears up his fiery Head, and lashes his Venomous Tail, ready to rush on, and devour. To speak without Methaphor, TREASON appears barefaced and unmask'd: The Prophecy contain'd in a Letter said to be written from *Donay*, and publish'd about Three Years ago, is now fully accomplish'd: The restless Faction, who ever since the late happy Revolution have undermined our *Legal Establishment*, talk no longer in doubtful Insinuations in favour of the *Popish Pretender*. Their *Important* and *Seasonable Queries*, about his Birth and Legitimacy, are now back'd by *Direct Assertions* of his Right and Title, which come abroad, not in the humble Form of a Pamphlet, but in the Pomp and Magnificence of a Folio; and are publish'd and proclaim'd to the World, not only by the Trumpeter of the Faction, the Post-Boy; but even, (whether Surreptitiously I know not) in a State-paper, the London-Gazette. This audacious

ous Insult on Her Majesty's Undoubted and Rightful Title to the Crown of these Realms, could not escape the Notice and Indignation of Her Vigilant and Faithful Ministers, who, in Discharge of their Duty, have order'd the Person that handed the *Treasonable Book* to the Press, to be prosecuted; And there's no Doubt to be made, but the Guardians of our Constitution, will in the most solemn Manner, Vindicate Her Sacred Majesty's Lawful Government, and assert the *Hanover Succession*, as the only Security of our Religion, Laws and Liberties. But as it is the Duty of every Loyal Subject, and true Briton to defend Her Majesty's Title, and our Happy Establishment, I shall endeavour to apply an *Antidote* to the *Spreading Venom*, by Detecting and Exposing the Fallacy and Weakness of the *Treasonable Positions* contain'd in the Book, entitled, *The Hereditary Right of the Crown of England asserted; the History of the Succession, since the Conquest clear'd; and the true English Constitution Vindicated from the Misrepresentations of Dr. Higdén's View and Defence, wherein some Mistakes also of our common Historians are rectify'd; and several Particulars relating to the Succession, and to the Title of the House of Suffolk, are now first publish'd, from ancient Records and Original MSS. together with an authentick Copy of King Henry VIII's Will. By a Gentleman; London, printed by G. James, for RICHARD SMITH, at Bishop Beveridge's Head in Pater-Noster-Row. MDCCXIII.* This pompous Title is graced with the following Motto,

*Ille, ut Opes fracta Teucrum, et fortuna recessit,
Res Agamemnonias, Victriciaque Arma Secutus,
Fas omne abruptit.* Virg. *Æn.* 3.

That is,
Who, when he saw the Power of Troy decline,
Forsook the Weaker with the Strong to join,
Broke every Bond of Nature, and of Truth.
Dryden's *Virg.*

This

This Book, tho' said to be written by a single Gentleman, is, I'm inform'd, the Result of the *Joint-Labours* of a Set of *Non-Jurors*, at the Head of whom, are reckon'd Mr. L—y, Mr. N—n, and Mr. B——d, which last was the Person that deliver'd the Copy into the Printer's Hands, Assisted by Two *Jacobite* Lawyers.

The Treasonable Design of this Book, which is under Pretence of *Asserting the Hereditary Right of the Crown of England, and of Vindicating the English Constitution from the Misrepresentations of Dr. Higdén's View and Defence*: is not only 1. To set aside Her most Sacred Majesty's legal and rightful Title, but also, 2dly, To break and dissolve the Union of the Two Kingdoms, by asserting the Right and Title of the Stuarts to the Crown of Scotland only; and reviving the Title of the House of Suffolk to the Throne of England; And, 3dly, To set up a *Testamentary*, against the *Hereditary and Parliamentary Right*.

Before I make REMARKS upon this Book, I shall deal fair^{er} with my *Adversaries*, and give the Readers a *faithful Abstract* of their whole Performance, which consists of Three Parts, viz.

I. The INTRODUCTION.

II. The BODY of the BOOK.

III. And the APPENDIX.

First, Then in the Introduction, the Authors assert, That the first Time that the Duty of paying Allegiance to Powers in Possession began to be taught publickly in this Kingdom, was during the Usurpations, which succeeded the Death of King *Charles I.* That in all former Revolutions, the Princes who got Possession of the Crown, claim'd it by some Right, and never insisted on Possession, as Right: But the *Rump-Parliament*, and *Cromwell*, and the following Usurpers, having no tolerable Pretence to any Claim of Right, their Friends were reduced to a Necessity of pleading *Possession*, as a Right to Obedience; and several Books were then publish'd by Papists, Fanaticks, and Deists, to enforce and prove it. But that this Principle was then generally rejected, by all the Members of the *Church of England*, and by many *Presbyterians*, who maintain'd, that Allegiance was due to the rightful King, who was not in Possession;

That after the Restoration, the Acts, and Judicial Proceedings of the Governments preceding, were all null and void, except such as were authorized by a new Law: And it was declared by an Act of Parliament, That all the said Powers before in Possession, *were rebellious, wicked, traiterous, abominable Usurpations, detested by this present Parliament*: And the Reason follows immediately, *As opposite in the highest Degree to His Sacred Majesty's most just and undoubted Right, to whom and His Heirs and lawful*

P. 2. *Successors, the Imperial Crown of these Realms with their Dominions and Territories, do of Right appertain; and as violating the just Rights and Privileges of Parliament,* That here the Constitution was again resettled on its ancient Foundation; not on Possession, which all the Usurpers had; but upon the *undoubted Right* of the Lawful Heir, who had been out of Possession, and of his *Heirs and lawful Successors*; And that agreeably to this Constitution, in that Reign it was the constant Doctrine of Lawyers and Divines, that Allegiance was not due to all Powers in Possession. That the Revolution that happen'd after, was begun, carry'd on, ended, and justified on these Grounds, That Allegiance was not due to all Kings in Possession: That King *James* was lawfully depriv'd; That King *William* and Queen *Mary* were lawfully put into Possession. But these Positions did not suit with the Principles of many Lawyers and Divines, who had constantly maintain'd, that the Deposition of a lawful King was absolutely unlawful by the Law of GOD, and the Laws of this Kingdom: Therefore, to justify the Translation of their Allegiance, the former Opinion, that seem'd buried at the Restoration, was reviv'd; viz. That *Allegiance was due to all Powers in Possession*; and many eminent Members of the Church of England receiv'd it, as consistent with the Doctrine of Non-Resistance: That divers Treatises were then publish'd by Divines and Lawyers, to defend it; of which the most celebrated were the Compositions of great Writers renowned in Controversy. *The Unreasonableness of a new Separation, and the Case of Allegiance due to Sovereign Powers.* That the Instances of History and Parliament Records used in the first, were enquir'd into by an exact and faithful Historian, and unanswerably refuted: The Arguments of the last from Scripture and Reason, the Doctrine of the Church, and the Laws of the Kingdom, were refuted likewise by several Writers; and no Reply of Moment being made, that Controversy seem'd to be buried again; That Dr. *Higden* thought fit, after many Years of Satisfaction, to examine the Dispute again; and having weigh'd in his

his Judgment the Arguments against *Possession*, found them to be light in the Balance; and was p. 3. convinc'd, that Allegiance was due to Kings in Fact, by Law Divine and Humane: And to convince others, he drew *A View of the English Constitution*, and some time after, a *Review* to defend it against several Answers, in which his new Scheme had been thoroughly refuted: That it will appear probable at least, to every one who reads the Doctor's two Treatises with Attention, that when he look'd into *English Law* and History, he had always his Opinion directly in his Eye; that he observ'd, what was fit for his Purpose; and what was not, he overlook'd, or saw it through a bad Perspective. That thus having collected all the Materials he could find in Law and History, favourable to *Possession*, he rounded, and smooth'd, and shap'd them, by his own Glosses, to his own Opinion, which he presented to the World in Print, and call'd it *A View of the English Constitution*. But that it appears not, that the Doctor, with all his Diligence, hath found out any material Proof of his Constitution, which his Predecessors in this Controversy had omitted: That he hath himself given us a Summary of his Proofs, which had been all urg'd and answer'd before, by the Writers on this Subject, after the Revolution; and most of them had been pleaded by the Writers for *Possession* before the Restoration. That the Doctor indeed endeavours to distinguish himself from the Advocates of those *Usurpers*, and particularly *Cromwell*, who had been often objected by his Adversaries: And once for all he dispatches Oliver by three killing Reasons; which the Authors think fit to examine. The first, *That Oliver had not the Legislative Authority of the Kingdom, nor was ever acknowledg'd by our Kings to have had it; and therefore could not have the sovereign Authority of the Kingdoms.* To which it is answer'd, That He actually exercis'd all sovereign Power, Legislative, and Executive. By the Instrument of Government, *The supreme Legislative Authority of the Kingdom was in his single Person, and the People in Parliament; but the Administration of it was left to the Lord Protector, and his Council,* p. 4. nominated by him. By his own Authority he made Scotland one Commonwealth with England; and he pass'd five Bills in his second Parliament: But *his Legislative Power was never acknowledg'd by our Kings.* His pretended Acts, on the contrary, were null after the Restoration. For what Reason? The Law hath plainly declar'd it; because the Power that made those Acts was *Usurpation*, opposite to the undoubted Right of the King and his lawful

Heirs, and the just Rights of Parliament. The Law is plainly declarative of the true English Constitution, that to the Authority of Law is requir'd a lawful King, and a lawful Parliament; and the Want of the first is the chief Cause of the Nullity, because without the first the second cannot have Existence.

That the second Reason of Dr. *Higden*, is, That *Oliver*, who had not the Regal Title and Office, could not have the Legislative Authority in this Monarchy, in which, by our Constitution, a Law cannot be made without a King or Queen; and therefore all the Acts of *Oliver* sunk of themselves, as Nullities ab Origine. To which the Authors answer, That as to the Name King, *Oliver*, when his Parliament offer'd it, denied to take it; but he took and executed the Office. That the Name of King or Monarch denotes Sovereignty vested in a single Person, which *Oliver* really had, and was therefore really that, which those Words signify; for he actually exercis'd Sovereignty in a higher Degree, than did ever any of our Monarchs since the Conqueror. But is Allegiance due to a Sound, or Syllable? Is there any Law, that nulls the Acts of Kings, if they change their Style? If the King of *England*, whose Crown is Imperial, should assume the Style of Emperor, would all his Laws be null? Would he thereby forfeit his Crown Imperial? So he would, if he lost his Authority. Majesty was once as unknown to our Constitution, as Protector. The Kings of *England* were styled Lords of *Ireland*; yet as Lords, their Acts were valid; and when *Henry VIII.* took the Title of King, unknown to the Constitution of *Ireland*, were

his Laws afterward Null ab Origine? If *Cromwell* p. 5. had taken the Style of King, as he actually exercis'd the Office, his Authority and Right would have been still the same: The Usurping of a Word would not have made Legal all his other Usurpations; and it is morally certain, that if he had taken the Style of King, the Nation would not have acknowledg'd his Right to make Laws; and that after the Restoration, they would have sunk of themselves, as the Laws of an Usurper. That Dr. *Higden*'s third Reason is, That those only have been acknowledg'd for Kings for the Time being, who have been plac'd in the Throne by the States of the Realm, and recogniz'd by Parliament; whereas *Oliver* had not the Consent of the Three Estates; Two of the Three Estates, the Lords Spiritual and Temporal, had been long before laid aside; and it was no better than a Mock-Representation of the Third Estate, that made him Protector. To this it is answer'd, First, as before, That *Oliver*'s Laws were Null, not because he was not advanc'd and

and recogniz'd by the States, but chiefly, because his Usurpation was opposite to the undoubted Right of the Lawful Heir. That the Doctor's three Reasons are but one in Reality, and one Reply is sufficient to confute them. But, 2dly, There is no Law which declares, that *Kings for the Time being* must be necessarily plac'd in the Throne, and recogniz'd by Parliament. The Eleventh of *Henry VII.* makes no Mention of that Necessity; but supposes only in general, that Allegiance is due to the King for the Time being: The Words themselves imply only his Existence, not the Moral Causes, or Effects of it. And the Doctor hath cited no Authority of Law, nor produced any Reason to justify or support his Assertion; That on the contrary 'tis notorious, that the Kings of *England* have Regal Authority, before a Parliament is called: And therefore their Authority is not the Product or Effect of Parliament. That Thirdly, Most of the Doctor's Kings in Fact were Kings in being for some time, before the Recognition of the Three Estates: That it cannot be prov'd, That the Three Estates did constitute a Parliament, before the Middle or End of the Reign of *Henry III.* that *Henry V.* *Henry VI.* *Richard III.* *Henry VII.* were Kings in being, and exercis'd Regal Authority, before their Parliaments met: p. 6. And thus Nine of the Doctor's Kings *de Facto* were not plac'd in the Throne by the States. That *Edward III.* was set up by an Assembly, call'd and pack'd by an infamous Adulteress, when the King her Husband was in Prison. That *Richard II.* was also in Prison, when the Parliament call'd in his Name, depos'd him, and set up *Henry I.* That 'tis well known, who is *Caput, Principium, & Finis Parliamenti*: And the Doctor may resolve us, whether an Assembly is free, when the Head is imprison'd? and whether perfect Freedom is not necessary to a lawful Parliament? That Fourthly, Since Acts done without a Lawful Power, are Null *ab Origine*; the Doctor must allow, as he does, that the Three Estates have a Lawful Power to place a King on the Throne, as well as to recognize him, when he is plac'd: For if they have no such Power, their Placing a King is nothing; and cannot give Authority, which they have not. That the Doctor understands not this of Placing Kings on the Throne, who have an Hereditary Right; but of Kings, who have it not: And then the necessary Consequence is, that the States have a Lawful Power of deposing Rightful Kings, to set up Kings *de Facto*; for they cannot place the one, without displacing the other. Thus one Parliament set up *Edward III.* by deposing his Father; and another, *Henry IV.* by deposing *Richard*. That

That these two Powers have been always join'd in Fact, *Destroning*, and *Advancing*; and if the Doctor will maintain, that the Three Estates have a Power to depose Lawful Kings, he may affirm it frankly; and he will find just as many Acts and Precedents for his Depositions, as for his Promotions: But if he will maintain, that the States have a Lawful Power to *place a King on the Throne*; but not to depose a Lawful King; he will maintain a manifest Contradiction: For if the Deposition of a Lawful King, for want of Moral Power, is Unlawful and Null; he remains, as he was, a Lawful King, endu'd with Lawful Authority; but he hath no Authority, and is not Lawful, if another King is Lawfully plac'd on the Throne by the States, and invest'd with Lawful Authority. That to create one King, is to destroy the other: Therefore they who have not a Power of *Destroying*, have none of *Creating*; and if they will create, the Being they produce

p. 7. is Morally Nothing. That in the Doctor's Opinion, *Charles II.* when dispossest'd, was Actually and Lawfully King, because *there was no King in Possession against him*. Does he think King *Charles* would have quitted the Regal Title, if *Oliver* had assum'd it? Be it so; but suppose the States conven'd had recogniz'd *Oliver*, as King; in that Instant, in the Doctor's Opinion, he would have had Regal Authority, and King *Charles* would have been deprived of it. But how could he have lost it in an Instant? By the States Authority of deposing him, of advancing and recognizing *Oliver*. Resistance, Deposition, Promotion, Recognition begin, advance, and finish Revolutions. Consent of the States and People legitimate All, or Nothing. The proper Way therefore of resolving Difficulties, is to begin with the first Acts; to examine whether Resistance and Deposition are lawful; then to consider, whether Subjects (such are the Three Estates) have a Moral Power, by their own Consent, to discharge themselves from their Allegiance to one King, and to give Regal Authority to another: If their Consent absolves them, they have a lawful Power of Deposing; if not, their Consent is unlawful, and void; and hath no Moral Operation: That, *Fifthly*, Since the Law (13 Car. 2. c. 1.) hath declared, *That neither both, nor either of the Houses of Parliament, have a Legislative Power, without the King*; it is hard to understand, how the Three Estates can give a Legislative Authority, which they have not, to a King, who hath it not; and that their Consent, which is no Law, can make a Law-giver, and become a Law to all the Subjects, by laying the Obligation of Allegiance on them.

That

That, *Sixthly*, Whereas Sovereignty is deny'd to *Oliver*, because he had not the Consent of the Three *p. 8.*
Estates of the Realm; this may raise another Difficulty: For if one of the *Estates* is excluded, (as in a Neighbouring Kingdom) then it seems, in the Doctor's Opinion, that a King so made hath in that Kingdom no Right to Sovereignty, and is not truly a *King for the Time being*: The Constitution, as to the Three *Estates*, in both Kingdoms, was the same; and it is hard to find a Reason, why if one *Estate* is lawfully excluded, so may not another; the Temporal, as the Spiritual Peers; for both have the same Right by the Constitution; and if Two of the Three may be excluded, so a Part of the Third, and so another Part, till the Three *Estates* are brought to a *Rump*, which may be also lessen'd, and at length wholly excluded; and so this Tail of a Distinction, by plucking out all the Hairs, will be reduced to nothing. That, *Seventhly*, Tho' *Oliver* had not the Consent of the Three *Estates* Lawfully assembled, yet all the *Estates*, and the whole Body of the Kingdom liv'd quietly under him, paid him Taxes; receiv'd Justice and Protection from him. The Majority of the Knights, Citizens, and Burgessees, elected by the People in his two Parliaments, sign'd a Recognition of him: His Establishment was so notorious, that all the Princes and States of *Europe* acknowledg'd him by Ambassadors. What follows? If the main diffusive Body of the People of *England* own'd him; this is surely equivalent to any Recognition of the Body Representative, or of the Three *Estates*, and the Whole being greater than a Part, the Authority of the Whole is greater in Proportion: But it cannot be deny'd, that it confers at least as much Authority, according to the Law of Nature, and the Practice of Nations; and the Law of *England*, as is said, hath no where declar'd, That the Consent of Parliament can make *Kings for the Time being*, or that in King-Making the Representers have more *p. 9.*
 Authority, than the Body represented. That, *Eighthly*, The Doctor himself, who excludes *Oliver*, because he had not the Consent of the Three *Estates* hath employ'd two Chapters in his *View*, and as many in his *Defence*, to prove, that Subjection is due to Sovereign Power in Possession, by our Saviour's Decision about Tribute, and by the great End and Design of Government. The Subjects therefore, were discharg'd from their Allegiance to the King who could not, and were bound to pay Tribute to the Protector, who could, and did protect them. And if this is agreeable to the great End and Design
 of

of Government, it is agreeable to the Law of Nature. Suppose then, that Allegiance was not due to *Cromwell* by the Law of *England*; it was due by the Will of GOD, Natural and Reveal'd; by the Command of CHRIST, and the Laws of Nature; Laws superior to the Law of *England*. If the Eternal Word hath spoken and decided, what Need of consulting the Oracles of *English* Law? If the Law Eternal of all Government requires Allegiance to Possessors, what need of the Three Estates to Authorize it? Possession alone suffices; and according to the Doctor, Allegiance was due to *Cromwell*, for this one Reason; namely, that he was in Possession of the Government. That thus it appears, that the Doctor, against his own Reasons, gives *Cromwell* a Right to Subjection; His Usurpation is still in full Force against the Doctor's System, and evidently refutes it; And it must be confessed, that the Royalists, who adher'd to the King against *Oliver* were Rebels against the Ordinance of GOD, were Transgressors of the

p. 10. Law of Nature, and the Command of CHRIST; and that there never was, nor can be any Usurpation; for that implies Possession, which, according to the Doctor, is a Divine Right to Government.

But that the true State of the Controversy between the Doctor and his Adversaries, is, whether the Kingdom of *England* be, of Right, *Hereditary*? Or, whether it belongs, of Right, to every one, who gets Possession? Whether the Kingdom appertains to Lawful Heirs, or Actual Possessors? That the Distinction between Possessors by Force, and by Consent, hath no Ground in Fact and History; for all Possessors, not Hereditary, have been always set up by Force; Consent of States and People hath followed; and it is morally impossible, it should be otherwise: That they who promote, aid, or gain by a Revolution, will consent willingly, and all others by Necessity; tho' in all Invasions of Sovereignty in *England*, the Majority of the Nation hath been against them; yet the Less Party being stronger by the Possession of Power, hath forc'd the Consent of the Greater. That Consent therefore is the Effect, not the Cause of Possession; which cannot be made Morally Good by the Evil it produces; nor cease to be Evil, as long as it is Invasion of the Undoubted Right of the Lawful Heir. That the only Question therefore is, Whether *Inheritance*, or *Possession*, is by the Constitution the true Right to the *English* Monarchy? That 'tis true, the Doctor acknowledges in plain Words, That the Crown is Hereditary; and he denies it to be Elective: But what Kind of Inheritance can he mean consistently with him-

Self?

self? For, *First*, He asserts, that the *Inheritance may be limited by Parliament*, but it follows, that it is an Inheritance which may be taken from one, given to another, as often as the Parliament pleases; which seems to be an Inheritance very different from what is usually understood by *Hereditary Monarchy*; for it is truly *Elective*, since the Parliament chooses, or may choose the Successor always: And it is more *Elective* here, than in other *Elective Kingdoms*; for in all others the *Elected* have a Right for Life; in this a new one may be elected every Session. *Secondly*, He maintains farther, That a King plac'd on the Throne by the States of the Realm, is a True p. 11. and Lawful King for the Time being. He requires not, that his King should be of the Royal Family; he plainly declares, That if *Cromwell had had, what he had not*, the Consent of the Three Estates, he would have been, what he was not, a King for the Time being, with Legislative Power. Thus the Two Houses, without a King, can choose to this *Hereditary Kingdom*, and place on the Throne what Person they please. *Thirdly*, He affirms, That either *Queen Mary*, or *Queen Elizabeth*, one or both, were Illegitimate, and yet had a Lawful Title. But a Bastard is of Blood to none in Law, *Nullius Filius*, and therefore cannot Inherit. Thus, according to the Doctor, this *Hereditary Crown* is the Lawful Inheritance of those, who in Law have no Father, and therefore cannot Inherit. That *Fourthly*, He affirms farther, That it is our Saviour's Doctrine, that Subjection is due to Possession, and by the Law of Nature to Protection: The *Hereditary Kingdom* may therefore be Rightfully enjoy'd by a Commonwealth, a Rump, a Committee of Safety, or any other Power, that can get Possession, and afford Protection. That such is the Doctor's *Hereditary Crown*; if we collect his scatter'd Limitations, 'tis an Inheritance subject to perpetual Election of a King and Parliament, of the Two Houses alone; it may go to any Family, to no Heirs, to a Commonwealth, to any Power whatsoever. That the Doctor, in his *Views*, could not avoid seeing evident Proofs, that the Crown of *England* was *Hereditary*; therefore he acknowledg'd it Verbally, and deny'd it Really, as utterly destructive to his System of Possession. That he may understand Words as he pleases: But all other Writers of all Nations, and the Generality of all Men, understand by an *Hereditary Crown*, a *Monarchy entail'd on one Family*, and descending successively to the *Lineal Heirs of it*. Such are the Monarchies of *France*, *Spain*, *Portugal*, *Sweden*, *Denmark*, *Hungary*, and all other

Hereditary

Hereditary Dominions in the World; such is the *English* Monarchy, govern'd successively above Nine Hundred Years by the same Royal Family. But if the most

p. 12. ancient Hereditary Family in the World, hath not a true Right of Inheritance; if Prescription of Nine Hundred Years is Nothing against new Possessors; there is surely no Right to Government at all, nor any true Right of Inheritance, Publick or Private; but every thing is every man's; and Right, Prescription, Property, are Son's without Signification. That 'tis true, there have been many Interruptions in this Lineal Succession; some by the Cession of the next Heir; others by Testaments, which were thought to give a Lawful Right; others by Conquest; and others by a false Pretence of Inheritance: But that Right hath been always pretended; and all notorious Violations of Right were condemn'd at the Time by all good Men, and rejected after by the whole Nation; which *both always restor'd the Rightful Heirs*, as soon as it could shake off the Yoke of Conquerors and Intruders. That there have been many Changes in the Succession of *England*: Armies have set up Kings, who had no Right of Inheritance; Parliaments have confirm'd them; other Armies have dethron'd; other Parliaments have attainted them; and have declared the Entails of Parliaments Null. There have been divers Temporary Constitutions, if so they be call'd; as the Constitution of Conquest, of Kings by Election, of Sovereignty in the two Houses, of a Commonwealth, and lastly, of Protectors; every Power in Possession hath been the Constitution. But that the Seeds of these Constitutions fell upon a Rock; forthwith they sprung up and flourish'd; but because they had not Root, they wither'd away; none of them liv'd so long, as to gain the Title of Prescription; one or two grew up to Maturity, and died; the rest perish'd in their Infancy. The Tree of Hereditary Right hath been several times cut down to the Ground; *but the Stump of the Roots in the Earth hath grown up again, and hath reached unto Heaven. The Kingdom hath been sure, and the Nation hath been convinc'd, that the Heavens do rule.*

That after the Norman Conquest, when the Government was quietly settled under Henry I. all the great Men of the Kingdom bound themselves by Oath, to the Succession of Maud his only Heir, to whom alone (as a good Historian affirms) *the Lawful Succession was due from her Grandfather, Uncle, and Father, all Kings; and from her Mother's Race for many Ages past.* By her Right succeeded Henry II. her Son, from whom all the Royal Family is descended;

scended; and he and all his Successors, for above 350 Years, have enjoy'd or claim'd the Crown by Hereditary Right; even those who had it not, did claim it; as *Jahn, Henry IV, Richard III, Henry VII*: Which seems an evident Proof, that our Constitution is Inheritance. That in Morality 'tis thought a good Proof of the Natural Distinction between Right and Wrong, that the Worst of Men pretend to Justice, and would prefer Right, if by it they could compass their Desires: There have been often Competitors in *Poland*, about the Right to the Kingdom; all have claim'd by Election: The Constitution of *Poland* is therefore Elective. The Kings of *England*, who had not Hereditary Right, have claim'd it for many Ages; never was any King in *England*, who would not have prefer'd Hereditary Right to all other Titles; the Constitution of *England* is therefore *Hereditary*: But if *Possession* is *Right*; *Birthright*, and all other Rights are Songs and Fables. That all Hereditary Titles, that were ever receiv'd in this Island, were united in the Person of King *James I.* The Three Estates in Parliament, by the Act of Recognition (1 *Ja. c. 1.*) acknowledging this to be an *inestimable, and unspeakable Blessing*, agnize the King's indubitable Right, and their own most constant Faith and Obedience to his Majesty, p. 14. and his Royal Progeny. And declare, That immediately on the Decease of Queen Elizabeth, the Imperial Crown of England did descend to his Majesty. That his Right to Crown is Inherent Birthright, and Lawful Succession, as being Lineally, Justly, and Lawfully next, and Sole Heir of the Blood Royal of this Realm. To which Right they faithfully submit, and oblige themselves, their Heirs, and Posterities for ever, until the last Drop of their Bloods be spent. They beseech his Majesty to accept the same, as the first Fruits, in the High Court of Parliament, of their Loyalty and Faith to his Majesty, and to his Royal Progeny, and Posterity for ever. They preface all this by affirming, That they are bounden thereunto by the Laws of GOD and Man. And to put out of all Doubt the perpetual Obligation of this Law, in the Intention of the Legislators, they enact it, as a Memorial to all Posterities, among the Records of Parliament for ever to endure. Now, adds the Author, What Law for the Declaration of Right can be found, in all the Codes and Pandects of the World, more express, more full, and comprehensive? How could they bind more strongly themselves to the King, their Heirs to his Heirs, their Posterity to his Posterity for ever? They make the *Hereditary Right*, and the Obligation of the Subjects to it, as far as they can, immutable, and eternal: They affirm, it is establish'd by Law

Law Divine, and Humane: The Right of the Crown is not Possession with or without Consent; it descended to King *James* before Possession, at the Instant the Queen died; so it is to descend by this Law to his Heirs for ever: The true Right is (not Possession, but) Inherent Birthright, Lineal Succession. Other Persons were then living of the Royal Family; but the *Next* is declar'd to be the *Sole Heir*. The Crown is appropriated to the *Next Heirs* of the Royal Family for ever: The Three Estates vow Obedience and Loyalty to the King, and his Heirs by Lineal Descent; they debar themselves and their Posterity from paying it to others: They devote

p. 15. their own Blood, the *last Drop* of it, and all the Blood of their Heirs, to maintain the Lawful Succession against all Opposers: And to this Eternal Duty they are bound by the *Laws of GOD and Man*. The Vows and Acts of Fathers are suppos'd to bind their Posterity: The Three Estates presume, that they have a Power to bind theirs; They affirm in this Recognition, That the *Court of Parliament is the whole Body of the Realm*; The Politic Body is the same now as it was then; and every Member of it hath in Effect made the same Recognition; so that this Act, till the Society hath revok'd it Lawfully, lays the same Obligation on every Member of the Society, as if he had Personally consented to it. This Act is an *Original Contract*, made with the *First King of this Line*, and with his Posterity; the whole Nation obliges it self therein to the Heirs of this Family for ever; if before this Act of Recognition there were Disputes about the Right of Succession, here they are ended: After this Law, there cannot be any reasonable Dispute, to whom the *true Duty of Allegiance* is due, by *all Laws, Reason, and good Conscience*; for here it is declared, That the three Estates, and all the Realm, are bound by the *Laws of GOD and Man*, to pay it to the Lawful Heir in the Order of Succession. That here it may be remembred, that the Right of Inheritance, established so fully in this Act of Recognition, is again more briefly, but as effectually declared in the Act of *Charles II.* (12 *Car. 2. c. 12.*) wherein it is affirmed, in Opposition to all Usurpations, That the Imperial Crown of these Realms appertains by *Just and Undoubted Right*, to the King, and to his Heirs and Lawful Successors. As the undoubted Right was in King *Charles*; so after him in his Lawful Heirs: As the Crown appertain'd by Law to him, when he was out of Possession; so it must be understood to belong to his Heirs and Lawful Successors, if they should be out of Possession also. By the

Act

Act of King *James*, Birthright is declar'd to be the perpetual Right to the Crown: In this Act of *Charles II.* it is affirm'd to be the *undoubted Right*, even when others are in Possession. Neither of these Acts are *expresly repeal'd*; and both together seem to make an impregnable Proof, that Hereditary Right was by Law the only Right to the Crown of *England*. That against the positive Determination of Law, 'tis in vain to object the Pleadings of Apprentices in Law, and even the Sayings of great Lawyers, disprov'd by great Lawyers, and contradicted by themselves. If Lawyers will contradict the Principles of Law, the Right of Descent, and Duty of Allegiance, can their Contradiction destroy them? The Sayings and Sentiments of Lawyers must be judged of by Law, which is the adequate Rule of Moral and Civil Action; and if Law is not a clear Rule about the Right to Sovereignty, this Dispute can have no Determination; the Opinion of Lawyers can neither indemnify Men in this World, nor secure them from Damnation in the other. That much less is this Controversy to be determin'd by Facts and Precedents, which, how frequent soever, must be justify'd by Law: For Actions are not Lawful, because they are done and recorded; but because they are conformable to Law: And it is certain, that Injustice, publick and private, hath more Precedents, and fills History more, than Right and Justice. That King *Stephen* enjoy'd the Kingdom by Perjury, Fraud, and Violence; *Edward II.* was depos'd, and cruelly murder'd; *Edward III.* a Minor, was set on his Father's Throne before his Time; *Henry IV.* contrary to his Oaths, and his Engagements with his own Party, depos'd and murder'd his Sovereign, and assum'd his Crown; *Richard III.* besides many other Horrible Murders, kill'd the King and his Brother, and took their Inheritance; *Henry VIII.* fix'd and unfix'd the Succession, as suited his Lust and Pleasure: A Parliament rais'd a Rebellion against the best of our Kings, by his own Authority; a Part of it Depos'd and Murder'd him: A Commonwealth was set up; and an Officer assum'd the Sovereignty, and transmitted it to his Son and Heir: These were Impious and Tragical Actions, of which the Actors have been, and are, and will be condemn'd, by all good Men for ever. That Dr. *Higden* cannot possibly approve them; yet by several of these, and such Precedents as these, he justifies his Opinion, That Possession with Consent is Right: Tho' the Possession hath been extremely wicked, and the Consent to Wickedness

extreme Iniquity. That he could find no Precedents, in which there was not a long Chain of Wickedness; Perjury, Rebellion, Invasion, Deposition, Murder, and Possession; that he hath collected out of History the greatest Crimes, and call'd them the Constitution: That a Divine might have consider'd, what hath been often urged, and seems unanswerable; that Unjust Possession obliges to Repentance and Restitution: And that no Man can have a true Right to what he is bound to restore; nor can others be oblig'd to maintain him in it. That the Doctor, no doubt, had read and consider'd *The true and exact History of the Succession*, (By Dr. Brady, printed An. 1681.) If that History is not what it pretends to be, the Doctor would have oblig'd the World by refuting it; but if it be really *true and exact*, as it is generally esteem'd to be; it is undoubtedly a full Refutation of the Doctor's Opinion: Here it hath been attempted to prove, that his Opinion makes the most unjust Possession (as was *Oliver's*) rightful; and destroys the Hereditary Right, so long Establish'd by the Constitution; and if the Doctor hath not sufficiently guarded his Opinions against these Objections, they seem evidently to Overthrow it. But because Books not particularly Answer'd, are boasted as Unanswerable: And because it may be of Service to the Publick, and to Truth itself, to vindicate our Law and History from the Mistakes of the Doctor, the Author of the following

p. 18. Work hath taken the Pains to follow him thro' all his Labarinth: And, to make the Way thro' it more easy, he hath examin'd, in the Order of Time, all the Historical Facts produced by him; hath refuted his Arguments and Comments upon them, and rectify'd his Errors about the *English Constitution*: And the best Commendation of this Treatise is, to desire the Reader impartially to examine it.

After this *Introduction*. The Author proceeds thus:

The Doctor's Design is to prove, That whoever is King *de Facto*, is by Consequence King *de Jure* too! And in his first Chapter, he undertakes the Defence of this Doctrine, from the known Customs, and uninterrupted Practices; that is, from the *Common Laws* of the Realm. *The People of England* (saith he) *always submitted and took Oaths of Fidelity to the Thirteen Kings, who from the Conquest to King Henry VII. came to the Throne without Hereditary Titles, as well as to the Six Hereditary Kings, who reigned in that Period; and this so universally, that I don't know, there are any Non-Jurors*

to be found in those Reigns. To this it is answer'd, That by *Hereditary Kings*, it is here evident, the Doctor means only such, as held the Crown by *Proximity of Blood*; and consequently by those, whom he affirms to have had no *Hereditary Right*, we are to understand such, as placed themselves in the Throne, when others, who had a nearer Relation to it by Descent, were living. But the Doctor should have known, that the Word *Hereditary* had a different Signification, than what he has assign'd to it, in our Ancient Writings. For *William the Conqueror* styles himself King *Edward's Heir*; and calls the Crown of *England* his *Inheritance*: And his Son King *Henry I.* affirms, That his Father succeeded by Right of Inheritance; and the same Assertion may be met with in *Guil. Pictaviensis*, and *Ordericus Vitalis*. Why therefore must the *Conqueror* be expunged out of the List of *Hereditary Kings*, when there is so good Authority to keep him in? Surely he very well knew, as did the Historians cited upon this Occasion, that he was not the next of Kin to King *Edward*; and yet we see, they did not think it an Absurdity to maintain his *Hereditary Title*: Nor certainly is the Doctor ignorant, that many of his Friends have lately taken it very ill, that the Word *Hereditary* should be appropriated only to such, as succeed by *Proximity of Blood*. That the Truth is, a Successor by *Will* is an *Heir* in the Language of the *Civil Law*; and therefore *William the Conqueror*, claiming by the *Testament* of King *Edward*, might justly be said to have as *Hereditary Title*: But this Concession will do the Doctor no manner of Service. For it is here proper to remember, what the Doctor thought fit for his Purpose to acknowledge in his *Defence*; That the Question between him and his Adversaries, is about the *Duty of Subjects*, whether they are to pay their *Allegiance* to all Princes, that can fix themselves in the Throne, or only to those, who are Lawful Kings, independently of their Possession. That the first they deny; and the latter only they think capable of a Defence: But they do not allow it to be a just Consequence from this Position, That they must never submit to Princes, whose Titles are not supported by *Priority of Birth*, or *Nearness of Blood*; which yet the Doctor takes for granted, and builds upon, as an uncontested Principle throughout this whole Controversy: And therefore he has very inauspiciously, at the Entrance of his Discourse, mistaken the true State of the Question; for instead of proving, that the People of *England* have

p. 20.

p. 21.

all along own'd the Authority of Princes, who had no other *Title*, but what they deriv'd barely from Possession; which was his only proper and necessary Business; he has been pleas'd to amuse his Reader with an Assertion, (the Truth of which was never yet call'd in Question) That many of our Kings, since the Conquest, were generally esteem'd *Rightful Successors*, tho' they were not the next Heirs, by Blood, to the Crown.

I would (*adds the Author*) explain my self a little more particularly upon this Article; because I find it has been thought of Moment by the Friends to the Doctor's Hypothesis. He affirms, *That the People of England always submitted and took Oaths of Fidelity to the Thirteen Kings, who, from the Conquest to Henry VII. came to the Throne without Hereditary Titles*; that is, who were not Heirs by immediate Descent to the Crown, and from thence he draws this Conclusion, *That whoever is in the Throne, has for that sole Reason, tho' he should be destitute of all other Pleas and Pretences, a sufficient Right to the Obedience of the Subjects*. But surely this Consequence cannot possibly be admitted; unless it is also evident, that where a Title by Birth is wanting, that Defect can no otherwise be supplied, but by Possession: For if it should appear, that much better Reasons may be assign'd for this Obedience, which was paid to the Doctor's *Non-Hereditary Kings*; he will then be forced to confess, that his Argument has fallen short of his Purpose. I would therefore intreat him to consider, *First*, Whether in this *Hereditary Monarchy of England*, there was not anciently a Power in the Crown, to interrupt and limit the Lineal Succession, by the *Exclusion of the Right Heir*. *Secondly*, Whether the Consent and Cession of the *Rightful Heirs*, are not sufficient to convey a Right to Princes, who wanted a Title by Proximity of Blood. And then, *Thirdly*, Whether it is not possible, that the general Submission and Obedience, which was paid to several of those Thirteen Kings, who are said by the Doctor to have had no Hereditary Right, might be the sole Effect of these Mo-

p. 22. tives and Principles. *First*, I ask, Whether in this *Hereditary Monarchy of England*, there was not anciently a Power in the Crown, to interrupt the Lineal Succession, by the Exclusion of the *Right Heir*? The Doctor makes no Question, but this has been an undoubted Part of the Prerogative of our Modern Kings, with the Consent of Parliament; and assures us, it was a Doctrine universally admitted by all Parties in *Henry VIII's*, and *Queen Elizabeth's Reigns*. Now I look upon this as a good Ground

Ground for *Presumption*, that their Predecessors had the same Authority; for there is Reason to believe, that whatever considerable Branches of Sovereignty have been exercis'd by Princes in these latter and declining Ages of the Monarchy, were as amply, at least, enjoy'd by their Royal Progenitors. But I need not rely upon Conjectures, when it appears from the Testimony of our Historians, that it was the usual Custom, *i. e.* the Common Law, in the Times nearer the Conquest, for our Kings to dispose of their Crowns, without regard to *Proximity* of Blood; and their Method of doing this, was by their last *Wills* and *Testaments*. Dr. Brady has by several Instances shew'd, that this is no groundless Opinion; but if I mistake not, he has omitted an Authority, by no means to be forgotten: It is a Passage in *Guil. Pittaviensis*, (who had been Chaplain to the Conqueror,) in which he tells us, That upon the Conqueror's Landing, Harold sent a Messenger to him, to inform him, that King Edward the Confessor, at the Time of his Death, bequeath'd his Crown to him; and therefore whatever

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Claim the Duke of Normandy pretended to it, it could be of no Authority; because it had been the constant Practice in England, ever since the Coming hither of S. Augustine, that Donations made at the Point of Death were always held good and valid. From whence it is evident, that this Power of the Crown was universally acknowledg'd in those Days; since the Claims of both Harold and the Conqueror were founded upon it; and the Dispute between them was only, which Donation of King Edward should have the Preference, without calling in Question his Authority to make them. — I Proceed now to the Second Query, and that is, Whether the Consent and Cession of the *Rightful* Heirs, are not sufficient to convey a Right to Princes, who before had no *Hereditary Title*? This I take to be a Point, which the Doctor will not be forward to dispute; for it was never yet doubted, but Princes might part with their Rights, as well as common Subjects; and prefer a private Life, before the Burden of a Crown. And when such Resignations have been made openly, and the Subjects have had reason to believe them free, and *bonâ fide*, whether by direct and express Terms, or by Actions, which sufficiently implied them; the Possessor of the Throne, who is next in Blood, does then certainly acquire a Power and Authority, which sufficiently justifies all his Acts of Government. It is true, by the Judgment given in the House of Peers upon the Claim of Richard Duke of York, it was declared, That the Resignations, without Consent of *Parliament*, did

not oblige the Makers of them; but this seems to have been the first Time, when this Doctrine was publicly establish'd; and therefore in all former Surrenders by the Right Heirs, it does not appear, that their Validity was ever question'd, though they were not performed in the great Council of the Kingdom. — And thus

p. 24. I have made my Way to the next Query, and that is, Whether it is not possible, that the general Submission and Obedience, which was paid to several of those Thirteen Kings, who are said to have had no *Hereditary Right*, might be wholly occasioned by these Motives and Principles? I am at present only concern'd for a bare Possibility of the Influence of those Reasons in the Cases in Question; because when once that is allowed, the Doctor's Constitution will still remain to be proved; and consequently we are not advanced one Step in our Discoveries of the mighty Efficacy, which attends the Possession of a Throne; tho' we should grant all his List of *Non-Hereditary* Kings, for which he so earnestly contends. But tho' I might content my self with referring this Matter to the Doctor's farther Consideration; and wait for better Reasons, for the Support of his Assertion; I shall in the mean while endeavour to satisfy him, that the *Conqueror*, and some of his Successors, did not depend wholly upon their *Possession* for their Title; but had both those Pleas on their side, which I just now mentioned; *viz.* The Nomination of their Lawful Predecessors, and the Consent of the next Heirs; and if these were good Reasons, upon which a Claim to the Crown might be founded; they were sufficient to justify the Subjects in paying them their Allegiance. — I begin with *William the Conqueror*; and affirm, That he was a Lawful King; *First*, Because King *Edward the Confessor* had appointed him his Successor, which in those Days was thought a Legal Way of disposing of the Inheritance of the Crown. For the Truth of this Assertion I have all imaginable Assurance; since it is unanimously attested by all the Writers, who flourish'd in, or near the Conqueror's Reign; And we have the concurring Testimony of many unexceptionable Authors, to prove the *Con-* p. 25.
queror's Right, by the Nomination of King *Edward*. Besides, this was no rash inconsiderate Act of the *Confessor*, nor the sole Effect of his own Will and Pleasure, without the Advice of his great Men and Counsellors; on the other hand, we find it ratified by the express Assent of

of his Nobility, and the People of *England*. This was notified to the Duke of *Normandy* by p. 26. the Archbishop of *Canterbury*, in a particular Embassy for that purpose. So that it must be looked upon as a publick Act of the whole Kingdom; and had all the Authority, which the deliberate Concurrence of the People with the Desires of the Prince, could possibly give it. And whoever well considers the *Conqueror's* Appeal to the Laws of *England* for deciding the Quarrel between him and *Harold*, cannot reasonably believe, he would have put his Cause upon that Tryal, if the Constitution had not been manifestly on his side. It may indeed be objected, that King *Edward the Confessor*, having no good Title to the Crown himself, could not convey one to the Duke of *Normandy*; and this I readily allow, if by a good Title we are to understand *Proximity of Blood*; which he most certainly wanted; for the Issue of *Edmund Ironside*, Elder Brother to King *Edward*, had undoubtedly a better Claim in this respect, some of which were living in King *Edward's* Reign. But I desire it may be considered, that when the *Confessor* entered upon the Throne, the Issue of *Edmund Ironside* were in a remote Country; and that by no Fault of King *Edward*, who had been driven himself into *Normandy* by the same Violence, that forced them into *Hungary*. So that in that Juncture, when the Right Heirs were at a great Distance, their Circumstances utterly unknown; and besides it was hardly possible to give them Notice of the Vacancy of the Throne, or receive their Answer within any reasonable Space of Time; either there must have been no Government in *England*; or else it must be confess'd, King *Edward* had good Cause to take it upon him, having a Prior Title to any one else then in *England*. If it be said, He was however an *Unjust Possessor*; his Nephews by his elder Brother being living, to whom he ought to have resign'd the Crown; I answer: That when Hi- p. 27. stories are silent, it does not become private Men to be forward in passing Judgment on the Actions of Princes. The Authors who have transmitted to us an Account of *Edward's* Reign, say nothing upon this Subject; either that the Descendents from *Edmund Ironside* laid Claim to the Crown; or that King *Edward* discovered any Inclination to do them Justice, at least till the Eleventh Year of his Reign: But it may be unreasonable from thence to infer, that all that Time he was a wrongful Possessor; because Cases may be supposed of Princes, who for want of Power and Opportunity of doing Right to the *Lawful* Heir,

are forced to endure the Burden of a Crown, which they would readily and gladly ease themselves of, upon a proper Occasion. As, when the Rightful Heir is Abroad, in a distant Kingdom, and perhaps at the Disposal of a Foreign Prince, on whose Will and Pleasure his Return to his Country chiefly depends. When the Possessor of a Throne has this to plead for himself, I may appeal to the severest Interpreters of the Actions of Princes, whether the Exercise of Royal Power in such Circumstances, can be charged with *Usurpation*; or whether such a Person is only a *King de Facto*. For it is not the bare Act of Seizing and Filling a Throne; but the *Will of the Possessor*, that must denominate him an *Usurper*. He that invades another's Right, with an Intention to detain it from him, and a Resolution never to restore it to the true Proprietor, is certainly guilty of the highest Injustice; But if he accepts of a Crown, only that *he may secure it to the Right Owner*, and the better disappoint the Designs of his Enemies; most certainly he obliges him by a very extraordinary Act of Friendship. In a word, by the Character transmitted to us of King *Edward*, he had neither Ambition enough to desire a Crown, nor so great a Love for State and Grandeur, as to be unwilling to part with it. When *Hardecnute* died, and the People of *England* wish'd for nothing more, than that *Edward* might be Successor; it was not without some Importunity, that he vouchsafed to be their King. And

“ since he is represented to us, as a strict Lover of
 p. 28. Justice throughout his Reign; and his placing *Malcolm* in the Throne of *Scotland*, in the Room of the Usurper *Macbeth*, is recorded as a considerable Instance of it; it will not become us easily to believe, he was guilty of that Crime himself, which he so severely punish'd in another. In the Eleventh Year of his Reign, he sent an Ambassador to the *Emperor*, to intimate his Desire of seeing his Nephews in *England*, in order to their Possession of the Crown of it; but this Embassy had no Effect till three Years after, a plain Indication, that either the King of *Hungary* was unwilling to part with them, or they themselves were very little affected with the Offer of a Crown: For what other Reason can be assign'd, why they should so long defer their Compliance with King *Edward's* kind Invitation? At length, however, we find them safely landed in *England*; and now it will perhaps be expected, that the *Confessor* should immediately make a Tender of his Kingdom. But the sudden Death of Prince *Edward* (which happen'd within a few Days after his Arrival) would have prevented the
 Execution

Execution of such a Design, had it really been intended; and his Children were yet *too Young* to be trusted with the Government. So that all things duely consider'd, I see no Reason for the Sentence which has been so peremptorily pass'd upon *Edward*, as an *Usurper*. I confess, the Nomination of the Duke of *Normandy* for his Successor, whereby his Nephew *Edgar* was manifestly excluded, seems to be a very plausible Objection against all I have said in his Vindication; for how could he be disposed to do his Kinsman Justice, when it is plain he disinherited him? To this I answer; *First*, That whoever duly considers the Circumstances of those Times, the Power and Ambition of *Harold*, with the Condition and Qualities of *Edgar Atheling*; will be quickly sensible, that his Uncle did not *mean him ill*, in denying him a Crown, which he could easily foresee he would never be p. 29. able to enjoy. When King *Edward* died, he was too young to do the Office of a King; a Circumstance undoubtedly not unthought of by the *Confessor*, who had Reason to be apprehensive, and then a fair Opportunity would be offer'd to the Sons of *Godwin*, of making themselves Masters of the Kingdom, which he knew they had long aspir'd after. Now it is evident, that he intended nothing more, than to disappoint the ambitious Projects of that Family, which he entirely hated; and therefore took all Opportunities of humbling them. This is assign'd as a Reason, why he had never any Carnal Knowledge of his Queen; (though a Lady that wanted no Charms, and is celebrated for her exemplary Vertues) for we are told by very grave Authors, that it was commonly believed, his Aversion to the Brothers begat in him that Resolution, never to have any Children by the Sister. He had not been long upon the Throne, when *Godwin and his Sons* made him sufficiently sensible of their Power, by obliging him to come to a Composition with them, from whence it was evident, what was to be expected after his Decease, should a young, unactive, and irresolute Prince pretend to succeed him. This Consideration made him cast his Eyes first on the Duke of *Normandy*, as the only Person capable of defeating the Designs of *Harold*; but especially after the Death of his Nephew *Edward*, the Father of *Edgar Atheling*; for then it was he enter'd into a strict Alliance with Duke *William*, and made it his Business to secure to him the Crown.

But

But (*says our Author*) there was one thing farther, which contributed most to determine King Edward in this Choice of a Successor; and that was, the very mean Genius, and manifest Inabilities for Government, he observ'd in his Nephew Edgar; for besides his *Incapacity*, by Reason of his Age, he had the Misfortune to want a due Proportion of those common Endowments of Mind, which were indispensably requisite, at that Time especially, to support him upon the Throne; through which Defects in his Understanding, he must soon have fallen a Sacrifice to those, who aimed at the Crown. This is attested by so good Authority, that it cannot reasonably be doubted of: *Ingulfus* expressly assures us, that the chief Reason, why King Edward refused to name Edgar his Successor was, *Because he perceived him to be unqualified for the Crown, as well by the Infirmities of his Mind, as those of his Body.* But William of Malmesbury gives us his Character in plainer Terms; *By reason (says he) of his unactive, and lazy Disposition, and (to use a softer Term) his Simplicity, he became contemptible:* I do not mention these Particulars, as if I thought his Qualities, how mean soever, could destroy his *Hereditary Right*; but only to shew, that these were *esteemed good, and sufficient Reasons*, even by his Friends, who were most concern'd for his Interest, to keep him out of the Throne; to which how just soever his Title was, his Uncle thought it would be a better Proof of his Affection to him, to leave him in the Condition of an eminent Subject, than that of a Titular King, which was the most could be expected. If I should add, that Edgar was sensible, it was his Interest, to decline the Possession of the Crown, and therefore complied with his Uncle's Settlement of it; I should not want Reasons to countenance this Opinion. Hitherto

p. 31. I have apologized for King Edward's Advancement of the Duke of Normandy to the Throne; taking it for granted, that the Right of Inheritance was really in his Nephew Edgar. But, *Secondly*, What if it should appear, that Edgar had not so good a Title, as has been generally pretended; but that King Edward himself was the true Proprietor of the Crown he enjoy'd, and might dispose of it as he pleased? I hope it will then be allowed, that no Wrong was done to Edgar. I desire therefore it may be considered, that the Claim of Edgar could only be founded on his Descent from Edmund Ironside his Grandfather; but Edmund being reduced to Extremities, does, by the Advice and Approbation of his People,

People, consent to a *Partition Treaty*, whereby the whole Kingdom was divided between him and *Cnute*; and upon *Edmund's* Death, all the Nobility and Bishops of the Realm declare upon Oath, that, by Vertue of the said Treaty, King *Cnute* was rightfully entitled to the Possession of the whole Kingdom of *England*; and they took their Oaths to him accordingly, as to their Lawful Prince, without any Regard to the Sons of *Edmund*, whom they denied to be their Kings. I know, several of our Historians are very angry with their Country-men upon this Account; and tell us positively, they were perjur'd, by a false Attestation concerning the Terms of this Treaty: But how came they to know that? And what Authority do they produce for this Accusation? Truly none at all.

I shall beg leave therefore to look upon that p. 32.

Publick and National Testimony, relating to the Agreement between King *Edmund* and *Cnute*, to be a good Proof of the Right and Title of the latter, till some Evidence appears to the contrary; and from the whole Matter I infer, That King *Edmund* having made an *absolute Surrender and Dedition* of his Kingdom, after his Decease, to King *Cnute*; his Sons, and their Issue were thereby entirely deprived of their Right of Succession; and consequently *Edgar Atbeling* had no just Pretensions to the Crown of *England*. But it will be demanded, how could the *Confessor* derive a Title from King *Cnute*? I answer; The *Confessor* being Half-Brother to King *Hardecnute*, (the Son of *Cnute*) and much in his Favour, was appointed by him his *Heir and Successor*; by which Donation having acquired the Crown, he had it entirely in his Power to dispose of it as he pleas'd; and was under no Legal Obligation to give it to his Nephew *Edgar*, rather than to the Duke of *Normandy*. Having thus vindicated the *Confessor's* Grant of his Kingdom to the said Duke; I shall now proceed to clear his Title.

It may be objected against it, that King *Edward*, when he lay dying, named *Harold* for his Successor, whereby his former Grant to the Duke of *Normandy* was revoked, according to the Law of *England* before mentioned, which held all *Donations* for Good and Valid, which were made at the Hour of Death; and we are told, That *Harold* challenged the Crown by Vertue of such a pretended Nomination. But the Authority of *William of Malsbury* (who lived near those Times) is sufficient to render it suspected: He confesses indeed, that *it was reported by the English, that King Edward did appoint Harold* p. 33.

his

his Successor; but he tells us likewise, That he *did not think it probable, that Edward should transfer the Right of Inheritance on a Person whose Power he always apprehended, and was jealous of.* This shews, that there was no good Evidence in those Days, of the Fact in Question. If any thing of that Nature had really happen'd; it ought to have been well attested, that there might have been no Room for a Doubt concerning it. The *Donation* to the Duke of *Normandy* was made with Solemnity; it was notified to him by the Archbishop of *Canterbury*; and ratified by the Consent and Approbation of the Nobility, and People of *England*; and lastly, his Right of Succession was sworn to by *Harold*, and the most eminent Persons of the Kingdom; so that no Man in *England*, could plead Ignorance of so publick a Transaction. What Reason, can we imagine, there should be, for *Edward* to revoke his first *Donation*, and appoint *Harold* his Successor, instead of the Duke of *Normandy*? Was *Harold* more nearly related to him? The Contrary is well known. Had the Duke of *Normandy* ever offended *Edward*? Nothing of this Nature appears in History. Was it more for the Interest, and Peace of the Kingdom? That would be a strange Assertion, if we consider *Harold's* Oath to the Duke of *Normandy*, by Vertue of which that Duke had a just Cause of War against him, if he should presume to take Possession of the Throne. In a word, the stronger the Motives were to alter the Succession, the more reasonable it was to establish such an Alteration by the best Authorities, and in the publickest Manner; whereas on the contrary, we have all imaginable Assurance of the Settlement made on the *Conqueror*; but very slender Proofs of *Harold's* Title. But if after all I have urged in relation to *Edgar Atheling*, his Claim should be still thought good, I beg Leave to observe farther, that after the Death of the Confessor, he either forbore to challenge the

P. 34. Crown as his Right; or else made an absolute Surrender of it. When *Harold* took Possession of the Throne, we meet not with the least Intimation, that he thought himself injur'd; nor was there an *English* Man, that we hear of, that resented his Exclusion. Can we then imagine, that his Title was at that time look'd upon as unquestionable? Or must we believe the whole Nation unanimously concur'd in depriving him of his Right? If they did, then the Injury was done *him by his own People*, not by the *Conqueror*; for he only dispossest'd *Harold*, who had no Right; and it could not be expected from him,

him, he should place a Person in the Throne, whom they had before rejected. It is true indeed, after the Battle of *Hastings*, when the *Saxon* Nobility were sensible, that their Liberties and Fortunes were in imminent Danger, and some daring Attempt was necessary; they declared *Edgar* their King; and placed him at their Head, in order to make a Stand against the *Conqueror*; but this was a desperate and vain Effort, as the Event soon shew'd; and then *Edgar*, with his Adherents, submit themselves to King *William*, and swear Fealty to him. In a little time after, it must be confess'd, *Edgar* revolted, and joining with the *Scots*, laid Siege to *York*; but the *Conqueror's* Appearance obliged him immediately to retire; and then he found it necessary, by a fresh Submission, to sue to him again for Favour; which he very generously granted him, and gave him many noble Testimonies of it. From that Moment we hear no more of him, during the *Conqueror's* Reign; but that he was well contented with the Honours and Riches heap'd upon him, and never would be persuaded to struggle more for a Crown; which, in the Opinion of all wise Men, it was no more for his Interest, than it was in his Power to obtain. It is evident, therefore, that *Edgar* made p. 35: a full Resignation of his Claim to the *Conqueror*, by Vertue of which (had King *Edward's* Settlement been of no Authority) he now became a King *de Jure*, and had a Right to the Obedience of the People of *England*; and therefore, I shall reckon him among those Kings, who had a good Title, independent on their Possession.

I shall now try, if I can do as much Service to his Son *William Rufus*; and that can be no difficult Undertaking, if the Kings of *England* had a Power of naming their Successors; which, by the Authorities I have produced, seems very reasonable to believe. That the *Conqueror* declared *Rufus* his Successor to the Crown of *England*, can never be controverted by those, who are acquainted with our Histories; which agree in nothing more, than in this Particular Fact. It is true, *Robert* Duke of *Normandy*, being eldest Son to King *William*, pretended *England* belong'd to him by Right of Inheritance; and therefore, with the Assistance of some of the great *Norman* Lords settled here, gave *Rufus* some Disturbance for two or three Years. But it seems, the *English* (who had the Confidence, in those Days, to value themselves upon their Fidelity to their Princes) thought *Rufus's* the better Title; and therefore firmly adhered to him; so that *Robert* found it advisable to come to an Agreement with his Brother, by which the Kingdom was entirely yielded

ded up to *Rufus*. *Rufus* violating the Articles of this Treaty, the two Brothers were soon after engaged in a fresh War; but those Differences were in a very little time amicably compos'd, by the Mediation of *Philip* King of *France*; and we do not find, that Duke *Robert* gave his Brother any farther Trouble during his Reign. On the contrary, about five or six Years before *Rufus*'s Death, p. 36.

Robert mortgages his *Duchy* of *Normandy* to him for 10000 Marks, and leaves him in Possession of it, during his Expedition to the *Holy Land*; and it is well known, King *Rufus* held it as long as he did the Kingdom of *England*: So that if the Conqueror's Authority to dispose of his Crown should be disputed; his Son *Rufus* was however a *Rightful King*, for the greater Part of his Reign, by the Consent and Agreement of his Brother. As for *Edgar Atheling*, it is evident, that he never laid Claim to the Crown after the Conqueror's Decease; neither had he any Friends to prompt him to it. The *English*, were unanimous for *Rufus*, on whom alone *Edgar* had Reason to depend; and if we search the Records of those Times, we shall meet with manifest Indications of his entire Submission to *Rufus*, as to his own particular Concerns. In the last Year of the Conqueror, *Edgar* obtain'd that Prince's Consent to go into *Apulia* with Two Hundred Men; and we are assur'd he set Sail from *England* upon that Expedition. In the Year 1089, we find him in *Normandy*; and then it is said, he was one of Duke *Robert*'s chief Counsellors. Now it must be observed, that Duke *Robert* did at that time challenge the Crown of *England* himself; and therefore we may be confident, *Edgar*, who entirely depended upon him, would not disoblige him by setting up an opposite Claim of his own. 'Tis rather probable, that *Edgar* would have been glad to have seen *Robert* on the Throne, for whom he had a most passionate Concern and Affection: But however that might have been; we are sure; that afterwards, upon the Reconciliation of the two Brothers, *Edgar* also made his Peace with *Rufus*; which, we may be positive, could not be effected, without the Recognition of his Title, and a Tender of his Service and Obedience: For a Proof of which, he undertook to mediate a Treaty between *Scotland* and *Rufus*, which terminated in p. 37.
a happy Peace between them. A few Years after, *Rufus* took Care to shew, in what a Degree of Favour and Credit *Edgar* was with him, by placing him at the Head of an Army, that he might settle his Nephew on the Throne of *Scotland*. Which mutual Kindnesses, between *Edgar* and the Two Brothers, are evident Tokens, that he had abandon'd

don'd all Thoughts of a Crown, and desired only to enjoy their Friendship, in the humble Condition of a Subject.

The Successor to *Rufus* was his Brother *Henry*, whose Title must be the next Subject of *Examination*. And what is there, that can fairly be objected against it, if the *Conqueror's Testamentary Power* is admitted? Was not *Robert*, the eldest Son, legally excluded by it? And did not that *Exclusion* justify *Henry's* Claim after *Rufus*? Or must we suppose the *Conqueror* (who had been highly provoked by *Robert's* frequent Rebellions, by which his Life was often endanger'd; and who, plainly discern'd in his Son an utter Incapacity for Government) intended only a short Suspension of his Title, which was to revive again upon *Rufus's* Decease? Upon the Death of this Prince, *Henry* loses no Time; but, with the Approbation of the Nobility, immediately steps into the Throne, and was universally obey'd by all the *English*, as their Lawful King. But when *Robert* return'd from the *Holy Land*, which happen'd soon after, he presently renew'd his Claim; and was assisted in his Attempts to recover it, by several *Norman* Lords then residing in *England*. Now the Question is, Which Party was in the Right; the *English* who adhered to King *Henry*, or the *Normans* who endeavoured to depose him? If the former; then *Henry* was a King *de Jure* in their Opinion: If the latter; then it was Lawful to take up Arms against a King in Possession, for the Right Heir out of Possession; which is manifestly against the Doctor's whole Design and Purpose. Possibly it will be said, the, *English* obey'd King *Henry*, because he was in Possession; and could not be justified upon any other Principle. But how do we know this? Is there any thing in our Histories, sufficient to support such an Assertion? Lastly, when the Doctor has done his worst, he can only prove King *Henry* to have been an Usurper the first Year of his Reign; for in the second, Duke *Robert* came to a Composition with his Brother, by which he absolutely yielded up the Crown of *England* to him, and *Henry* obliging himself to pay him 3000 l. per Annum, and restore to him some Lands in *Normandy*. Thus was *Henry* confirm'd in his Throne, and reign'd very prosperously the Remainder of his Days, without any Rebellion or Disturbance. A few Years after, it is true, *Robert* by breaking the Treaty he had made with his Brother, and his Oppressive and Tyrannical Government, provoked *Henry* to invade *Normandy*; and the Event was, that *Robert* was taken Prisoner, and sent into *England*; where he remained under Confinement in the Castle

Castle of *Bristol* to the Time of his Death, which
 p. 39. was the Space of Twenty Seven Years.

Upon this Occasion I shall step a little out of my way, to wipe off an Aspersion cast upon this Prince in our common Histories, upon the account of the Usage of his Brother; as if it were beyond Example barbarous and inexcusable. I have said, that King *Henry* found it necessary to invade *Normandy*, upon the repeated Complaints and Importunities of the Inhabitants of that Dutchy, who represented their Miseries as insupportable under his Brother's Government. For when the Pope desired King *Henry* to release Duke *Robert* out of Prison, and restore *Normandy* to him as his Right; the King answers, That what he had done, was at the pressing Instances of the Bishops, the Clergy, and the chief Nobility of *Normandy*; the insufferable Oppressions of his Brother tending to the manifest Ruin of their Country: and therefore they intreated him to rescue it from the Tyranny of a Person, who was by no means fit to govern. This was the true Motive of that Expedition against *Robert*; and this was the Reason, why he would not trust him again with the Government of *Normandy*; but sent him into *England*, there to be kept under a Gentle Confinement. I call it a *Gentile Confinement*; because I think I have good Warrant so to do; notwithstanding many celebrated Writers, have related a tragical Story of the Hardships he endured in his Imprisonment, and that at last he was deprived of his Eye-sight by the barbarous Commands of his Brother. The first Author, who thought this Story worthy of Credit, is *Matthew Paris*. But against

his Authority it may justly be objected, 1st. That
 p. 40. he wrote his History above a Hundred Years after the Fact in Question. 2^{dly}. This Piece of History is not found in *Roger Wendover*, (as Dr. *Watts* has observ'd) which is sufficient to render it suspected; for those who are proper Judges in these Affairs, tells us, that *Matthew Paris* is but the Continuator of *Roger Wendover*, and intended only to carry on the Series of History, where the other left off. It is true, in that Edition of *Wendover*, which *Paris* has given us, we meet here and there with some Insertions, not warranted by the genuine Copy of *Wendover* in the Cotton Library, yet supposed to be added by *Matthew Paris* himself; but it has been observed by learned Men, that those Interpolations are generally Pieces of secret History, and unworthy of any Credit. *Matthew of Westminster* is the next Writer, that has occur'd to me, in whom this Story is to be found; and he seems to relate it more fully,

fully, than *Matthew Paris*. His Account is this: (p. 37.) That *Duke Robert* having attempted to make his Escape out of Prison, had his Eyes put out in such a Manner, that the Balls of them were still preserv'd entire: and thus he ended his Days very miserably. But *Henry Knighton* (who wrote at the latter End of *Richard II's* Reign) has thought fit to add these farther Circumstances; That *Duke Robert* being condemn'd to die by the Barons of England, his Brother did him the Favour to cause his Eyes to be put out, by some burning Instrument applied to them. Now so remarkable a

Punishment inflicted on so eminent a Person, as p. 41.

Robert Duke of Normandy, the King's elder Brother, could not surely be a Secret to all the Writers, who flourished at that Time; and had it been known to them, undoubtedly they would not have failed to give us some Account of it. But to our great Surprise, instead of allowing any Countenance to this Story, they relate the quite contrary. *Will. Gemmeticensis* says, *Robert* was a Prisoner at large to the End of his Life; *Ordericus Vitalis* affirms, That he was supplied abundantly, during the Twenty Seven Years of his Imprisonment, with all manner of Delicacies. *William of Malmesbury's* Account is still more circumstantial; for he assures us, That *Duke Robert* being taken by King *Henry*, was kept by him as a Prisoner at large to the Day of his Death; and this, he says, was a laudable Instance of *Henry's* Brotherly Affection; in that he inflicted no other Punishment on *Duke Robert*, besides Solitude; if that may be call'd a solitary State, in which he was always attended with Company; and besides, was frequently entertained with Feasts, and other Diversions. I have said all that is necessary, in Vindication of *Henry I's* Title; for I know not how to imagine, that *Edgar Atheling* should be any more objected. He had before yielded up the quiet Possession of the Crown to three Kings; and therefore it is not likely, he should have any Stomach to it in this Reign. The Truth is, he had for some time liv'd with so much Privacy and Obscurity, that we hardly meet with his Name in the Histories of *Henry I's* Government; and had not *Malmesbury* told us, he was in Being when he wrote; we p. 42. might well have believ'd, he had long before resign'd his Breath, as well as his Title.

King Stephen's Reign follows in Order; in which, if any where, we may expect to find some plain and legible Characters of the Existence and Operation of the Doctor's Principle: For *Stephen* was indeed a King *de Facto*, without any Title, but what he deriv'd from Possession. The Kings,

that were before him, had either the *Will* of their Predecessors, or the Cession of the *Right Heirs*, to render their Reigns Lawful; but *Stephen* was an *errant Usurper*. He had sworn to the Succession of *Maud* the Empress; and he knew that all the Nobility and Prelates had done the same; and therefore as he had obtained the Crown by *Perjury*, he could not otherwise keep it, than by Arms and Violence. It is reported indeed, that King *Henry*, when he lay a dying, disinherited his Daughter *Maud*, and declared *Stephen* his Successor; and by this Artifice, it is said, the *Archbishop* was prevail'd with to crown him; but the Doctor has thought fit to reject this Story, as incredible; and I am very willing to agree with him in that Point; provided it may be allowed to be a farther Confirmation of the ancient Custom of the *Kings of England*, to name their Successors; for otherwise that Report must have been useless and insignificant; and could not possibly have served the Purpose, for which it was intended. Thus far therefore I have the good Fortune to be of the Doctor's Opinion; but that Happiness is not like to continue long; for I must now take the Liberty to tell him, that King *Stephen's* being an *Usurper*, will be of no manner of Advantage to his Cause, that I can by any means perceive. He was advanced to the Throne by the Bishops; and confirm'd in it by the Pope: And some of the Writers of *p. 43.* those Times speak of it with Admiration, *that in an Instant all England became subject unto him.* But we must distinguish between those, that advanced him to the Throne, and those that only obeyed him, and swore to him, when he was in it. The first Sort are exclaim'd against by the forementioned Historians, as unrighteous and perjured Men; and they observe to us, that therefore the *Archbishop of Canterbury*, by the just Judgment of GOD, did not live a Year after; and the *Bishop of Salisbury*, by the same Hand of Providence, ended his Days very miserably. And the Doctor himself is so far from justifying such Actions, that he will freely give us Leave to account it a Crime, to set up a King *de Facto*; tho' he contends for Obedience to him, when he is already made. The Question therefore is, concerning those alone, who submitted to his Government, and acknowledg'd him for their King, after he was placed in the Throne; these, the Doctor is of Opinion, cannot be defended by any honest Principle, besides this, *That Allegiance is due to a King in Possession.* But if this was really the Case, why have not our Historians done us the Favour to let us know it? Is there any Hint to be found in
the

the *Writers of those Times*, that may help us to the Discovery of so valuable a Secret? Unkind and Ill natur'd Historians! You that pretended to write for the Benefit of future Ages, how could you suffer us to be ignorant of a Doctrine, that had done you so much Service, and without which we can never be truly sensible of the Blessing of a Revolution? They have, indeed, been pleas'd to publish some of the Reasons by which the great Men endeavour'd to justify their Submission to *Stephen*; which must increase our Wonder very much, that the Doctor's Notion should find no Place among them, had it really been known and made use of. Some affirm'd, that their Oath to *Maud* was forced upon them by King *Henry*; for which he express'd his Sorrow on his Death-bed, and releas'd them from it. The great *Bishop of Salisbury* excused himself in another Manner; for he pretended, that he swore to *Maud's* Succession conditionally, *viz. Provided that the King did not marry her out of the Kingdom, without the Consent of the Peers.* Others alledged, it was unnatural, and against the Laws of the Realm, for a Woman to reign: And lastly, it was urged, that *Oaths* were not to be kept to the Hazard of Peoples Lives and Fortunes; for *Man was not made for Oaths; but Oaths were instituted for the Use of Men; and therefore no Man ought to be a Slave to his Oath; but his Oath ought to be subservient to his Interest and Safety.* P. 44.

These Reasons, (*adds the Author*) such as they are, may be found in the Writings of those Times; particularly in the *Causa Regis Stephani*, an ancient Manuscript in the *Cotton Library*, drawn up purposely in Defence of that Prince against *Maud* the Empress; and therefore it is not to be conceiv'd, so useful a Principle, so essential, as the Doctor thinks it to the Constitution, should have been forgotten upon that Occasion, had its Influence and Authority been so well understood, as he imagines: On the contrary, if we take an impartial View of this Reign, we shall meet with any Arguments to convince us, it was a Doctrine never thought of in those Times. That I may fully satisfy the Reader in this Point, I shall desire Leave to observe *First*, That there never was a more tumultuous Reign than *Stephen's* was, upon the sole Account of his being an *Usurper*. And, *Secondly*, That they who adhered to him, did not believe it to be their Duty so to do, purely because he was in Possession. In the 2d. and 3d.

Years of his Reign, the Commotions first began; p. 45.
and then *Robert* Earl of *Gloucester* declared for

Maud against him; and many Prelates, and Persons of the greatest Quality, in several Parts of the Kingdom, took up Arms for the *Empress*. In the midst of these Confusions at Home, *Normandy* provides itself with a new Master Abroad; and *David* King of *Scotland* takes care to invade the Borders in her Quarrel. The Year following, *Maud* the *Empress* lands in *England*, and was immediately assisted by the *Welsh*, under the Earls of *Hereford* and *Chester*; by whose Fidelity and Conduct she was soon in Condition to give Battle to *Stephen*, in which she took him Prisoner. It is true, by a Reverse of Affairs, he recover'd his Liberty before the Year expired; and fancied himself powerful enough to reduce the Kingdom entirely to his Obedience. But that Piece of good Fortune added only Length, not any Quiet to his Reign; for his Enemies never laid down their Arms, till they had obliged him to agree to a Composition with *Henry II.* which did not happen, till the last Year of his Reign. Is it not then reasonable to expostulate with the Doctor, why he should imagine, this Prince's Case could be serviceable to his Design? He was to prove the Right and Authority of Kings *de Facto*, from the Submission of the Subjects; but *Stephen* was never permitted to enjoy any Peace and Quietness, that deserves to be taken Notice of; because a great Part of *England* would not endure him for their King. But what was this Submission? Even such a one, as is made to Torrents and Inundations, when they cannot be resisted: And for the same Reason, every sudden and powerful Invasion may be thought to be approved of, when it is not opposed. *Stephen*, by the Assistance of a potent Army in *England*, seizes the Crown, whilst the true Heir is in a distant Country, and her Friends were wholly unprepared to assert her Right. In these Circumstances they comply with the Usurper, and promise Fidelity to him. But did they believe this to be their Duty? Did they act herein upon the Doctor's Principle; viz. *That Possession made him their Lawful King*? No certainly; the contrary is most evident: For no sooner did the *Empress* arrive in *England*, and demand the Crown as her Right; but they immediately repair'd to her, notwithstanding their late Engagement to *Stephen*: and served her afterwards with untainted Loyalty, till they had secured the Succession to her Son. Very true, says the Doctor; but herein they were guilty of a *Revolt*; they acted against their Oaths to *Stephen*; and ought to be look'd upon as Rebels. This is a very hard Censure; not only without Proof, but against the Faith

Faith of History ; which assures us, that those that quitted the Party of *Stephen* for that of *Maud*, did it upon this Principle, That their first Oath to her remained still in Force, and could not lose its Obligation by their subsequent Oath to *Stephen*. Well ; but if the Nobility were bound by their Oaths to *Maud*, we must condemn them for taking one to *Stephen* ; which the Doctor thinks is a *severe Reflexion on our Ancestors* ; because we must then say, *they either did not understand their Duty, or did not practise it*. But how can we help it, if our Ancestors were guilty of some Actions, which cannot be defended or justified ? Were they the only *Sinners* in the Universe in that respect ? Or is it a Shame for us to confess, what we can never hope to conceal ? Faulty we are sure they were upon one Account or other, either in swearing to *Stephen*, or in revolting from him ; and therefore, since it is not possible for us entirely to acquit them of both these Actions ; the best Service we can do for them, is to shew they were *sorry for the Crime they had committed*, and endeavour'd to atone for it by their subsequent Loyalty : And for this we have the Testimony of the Writers of those Times.

Thus we see *William of Malmsbury* abandons the Earl of *Gloucester* (for whom he had otherwise a particular Esteem, and Honour) to the Courtesy of his Reader, without any Apology for his Submission to *Stephen*, but what a Regard to his Interests, and the Necessity of Affairs could help him to. He says, *he was resolv'd to keep his Oath to his Sister, and do what he could for her Service, even at the Time he swore to Stephen* ; that is, he desired to be thought one of her Enemies, that he might the better Act the Part of her Friend. And is it not then evident, that this Earl of *Gloucester* could not possibly act upon the Doctor's Principle ? For by Vertue of that, his former Oath to *Maud* would have been absolutely void, and of no Obligation ; but he declares himself of a quite contrary Opinion in this Part of his Management : He believ'd he could not be releas'd from his Oath to his Sister, even when he took one to *Stephen* ; and did not pretend to justify his Fidelity to her, upon any other Consideration. It is apparent therefore, that his Example is by no means to be imitated, because not to be defended ; for by the Confession of its greatest Admirer and Advocate, he was guilty of manifest Perjury : But then I hope the Doctor will not take it amiss, if I think him very excusable, for what he did afterwards, in Favour of

his Sister; for surely, if he believ'd himself bound by his Oath to her, he had Reason to promote her Interest upon all proper Occasions, and to do his utmost to place her in the Throne. Let me add farther, as an evident Proof, that the Doctor's Principle was not understood and approv'd of in those Times; that *David King of Scotland*, though reduced to great Difficulties by his Adherence to the *Empress*, could never be prevail'd with to renounce his Oath to her, and take a new one to *Stephen*; insisting upon it to the last, that he was obliged to the inviolable Performance of it. Now had it been the current Doctrine of that Age, that whoever was in full Possession of the Throne, was to be obeyed; he would have been sensible of the Injustice and Folly of exposing himself to Dangers, for a Lady, whose Claim to his Service immediately ceased, from the very Moment her Adversary had made himself entire Master of *England*. *Great Num-*

p. 50. *bers* (says Dr. *Higden*) *of the Nobility, the Clergy and People of England submitted to Stephen, and swore Fealty to him as their King*; but great Numbers likewise of the Nobility, &c. who had thus sworn to him, soon after took up Arms against him, as an Usurper. So that here is Fact against Fact, and Example against Example; and the Question is, which of the two is to be regarded, as most justifiable, and worthy of Imitation. If we are to believe the Doctor, Allegiance was due to *Stephen*; and therefore they only were good Subjects, who kept their Oaths to him, and the Breakers of them *Rebels*; but his Adversaries are of a contrary Opinion; for they think it more reasonable to affirm, that the Oaths taken to him were unlawful; and upon that Account they highly approve of the Behaviour of those, who abandon'd *Stephen* for the Sake of *Maud*. This is the true State of the Controversy, as it presents it self to us from the View we have hitherto taken of *Stephen's* Reign; and consequently we are yet to seek for the Satisfaction promis'd from it.

The farther we carry our Enquiry into the History of this King, the more we find our Expectations disappointed. *Stephen*, in the Sixth Year of his Reign, was taken Prisoner at the Battle of *Lincoln*; and then the *Empress*, being Mistress of his Person, seem'd to be so of the Kingdom too; the Bishops at least, and the whole Ecclesiastical State, were of this Opinion; for they immediately took care to make their Peace with the *Empress*; swore Fidelity to her, and excommunicated all that adhered to *Stephen*. So far, it must be confess'd, the Doctor may have Reason to believe
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his Cause prosperous; and the Truth is; the great Bishop of *Winchester* urged it as an Argument to the Clergy, why they should swear Subjection to the *Empress*; viz. *because the Kingdom would be in Danger, if there was no Governor.* So that it was the Publick Good, and Necessity of Affairs, that brought them to this p. 51.

Compliance; which is all the Doctor contends for. But I must beg Leave to observe to him, that before this Council was assembled, the Archbishop of *Canterbury* being solicited to make his Submission to *Maud*, and own her Title, made Answer, *That he could not do it with Honour, till King Stephen had releas'd him from his Oath of Fealty he had taken to him; and therefore he, and many of his Prelates, with some of the Laity, took a Journey to the King, to confer with him upon that Affair; who gave his Consent, that they should yield to the Necessity of the Times.* Thus it is evident, they did not think themselves at Liberty to turn over their Allegiance to *Maud*, till they were admitted to do it by *Stephen*; to which alone that unanimous Recognition of her Title in the Synod of *Winchester*, which presently after ensued, is to be imputed. Is it not then apparent, that the Doctor's Principle had nothing to do in this Transaction? For that would have operated immediately, as soon as *Maud* was in Possession, without any Hesitation; and the Archbishop would never have given himself the Trouble of a Journey to *Stephen*, to ask that, which the Constitution of the Kingdom obliged him to. Besides, if the Example of the Prelates, and the Clergy of this Reign, is to prescribe to Posterity; it will not only be lawful to swear to every Prince in Possession, but to desert him too, whenever an Opportunity offers; for within a few Months after this solemn Promise of Fidelity to the *Empress*, made in a full Synod, the good Bishop of *Winchester*, finding his Brother's Party to be in a Condition to make Head against the *Empress*, takes an Occasion of quarrelling with her; defeats her little Army at *Winchester*; and obliges the brave Earl of *Gloucester* to surrender himself a Prisoner. The Consequence of which Victory was, that the *Empress* was forced to give *Stephen* his Liberty, p. 52.

that her Brother might obtain his; and this was no sooner done, but the whole Body of the Clergy assemble again; by the Authority of the Legate, revoke all their Promises and Oaths to *Maud*, and swear afresh to *Stephen*. What must we now think of this nimble Change in the Bishops? Was this effected too by the Doctor's Principle? Certainly no: For the mutual Enlargement of King *Stephen*,

phen, and the Earl of *Gloucester*, was agreed to upon these Terms; That *Maud* should keep the Lands and Castles she was then in Possession of; and both she and *Stephen* might defend their Pretensions as well as they were able. So that *England* was then divided between them; and either we must say, they were both in Possession, or neither. If *Stephen* was King *de Facto* of his Part, so was *Maud* Mistress *de Facto* of Hers; and therefore those Bishops, whose Dioceses were in Division, could never justify their taking Oaths to *Stephen*, upon the Account of Possession. The Truth is, tho' these Bishops did all along favour the Cause of *Stephen*, before that of *Maud*; yet at the latter End of his Reign, they plainly made a Distinction between him, and a King *de Jure*; for being then, in a general Council, they requested by him, to consent to the Coronation of his eldest Son *Eustachius*, in order to defeat the Designs of Prince *Henry*; they peremptorily refused to gratify him in this Point; alledging for their Excuse an express Prohibition, which they had received from the Pope, who would by no means permit, that the Father, who

P. 53. had obtain'd the Crown by Perjury, should be succeeded by his Son. From whence, it is evident,

they would not allow a King *de Facto* the same Rights and Privileges, which belong to a King *de Jure*; for the Son of a King *de Jure* has an undoubted Title to the Succession, which no Subjects ever presumed to dispute: But the Bishops did not think, that was *Stephen's* Case; and therefore would not consent, that his Son should inherit the Crown after him. And now the Reader will be able to judge, how dangerous it is, to make the Actions, even of the greatest Subjects, a Proof of the Constitution in any Reign. In this of *Stephen*, we find the Bishops and Clergy pretended to the sole Authority (where the Pope did not interpose) of making and removing Kings; and they took upon them to dispose of the Allegiance of the Subject, whenever they judged it necessary; or thought they might do it with Safety. But will any one infer from hence, that such Proceedings were warrantable by the Laws of *England*? Or that Oaths taken to a Person, that has the Power in his Hands, are to be considered only as the Effects of Fear and Compulsion; and are therefore of no Obligation? And yet this was one of the Arguments the Bishops insisted on for their Justification, in the contrary Oaths they took to *Maud* and *Stephen*. But their chief Plea on these Occasions, was the Pope's Authority, to which they profess'd an absolute Obedience. The Doctor
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is pleas'd to affirm, That his Adversaries had not proved, that this pretended Power of Popes, in setting up Kings, was ever practis'd; or that in Obedience to any such Papal Injunctions, Subjects had ever sworn Allegiance to Non-Hereditary Kings. But he must allow me to say, they had very good Evidence for this Assertion; and it is strange, the Doctor should overlook it, in his Perusal of *William of Malmsbury*: For that Historian tells us, that when Stephen had recovered the Throne, Henry Bishop of Winchester, the Pope's Legate, held a Council of Bishops, in which (notwithstanding their former repeated Oaths to Maud) they all declare for Stephen; and this they did in Obedience to the Pope's Command, whose Letter was read before them. And some Years after, when Stephen endeavour'd to get his Son crown'd, the Bishops absolutely refused it; alledging for their Excuse, that they had received express Orders from the Pope, never to comply with such a Proposal. I might produce farther Testimonies, to shew the great Influence the Pope's Commands had over the Prelates, and even some of the Nobility too, in this Reign; but would it from thence follow, that the Pope's Deposing Power was then establish'd by Law? That it was a Part of our Constitution? And that none could be Lawful Kings, but such as were advanced to the Throne by his Consent and Approbation? If this was really the Case, it must be confess'd, Maud had a very ill Cause: and so has the Doctor too; for then, it seems, Stephen was a Lawful King, by the Pope's Authority; not by Vertue of his being in Possession. I shall now only add the following short Observations; and then shall put an End to this troublesome Reign.

The first is taken from a Passage in our Historians, who speaking of the Agreement between King Stephen, and Henry Duke of Normandy, tell us expressly, That by Virtue of that Accommodation, and not sooner, Stephen became a Rightful King; which shews, they did not believe his Possession had made him so before. Secondly, When Henry II. obtain'd the Crown, he deposed the Noblemen made by Stephen, as meer imaginary, false Earls, and Lords; and resumed also the Lands granted to them by that King, tho' King de Facto: And all this was done for this sole Reason, viz. because Stephen was an Usurper; and therefore his Acts ought not to be prejudicial to the Lawful King; As the Chronicle of Normandy, the Book of the Abbey of Waverly, Mr. Seldon out of them, Guil. Neubrigenfis, and Chron. Brompton, inform us. This Remark

mark was long ago made by Mr. *Seldon*, and Mr. *Prynne*, Names of great Authority in our History, and who can never be suspected of Partiality in this Controversy. On the other hand, *Maud* the Empress had created *Milo*, Earl of *Hereford*; *Gaufred de Magna Villa*, Earl of *Essex*; and *Robert de Sigillo*, Bishop of *London*; of which Honours we do not find, that *Stephen* pretended to deprive them; and we are sure the Bishop continued in Possession to the Time of his Death, which was not till Ten Years after.

The next King, whose Title I am now obliged to enquire into, is *Henry II.* whom the Doctor is pleas'd to reckon among his *Non-hereditary*, or *de Facto* Kings, for these two Reasons: *First*, Because his Mother *Maud* the Empress, from whom he derived his Right, was living in the Fourteenth Year of his Reign. *Secondly*, Because the Royal Family of *Scotland*, being descended from *Edgar Atheling's* Sister, were before him in Blood; and therefore ought to have enjoy'd the Crown. But if it should appear, that these undoubted Heirs entirely resign'd up their Rights and Pretensions; I hope then the Doctor will allow *Henry II.* to be a Lawful King, without having Recourse to his Hypothesis. That the Empress

p. 55. had a just Title to the Crown, after her Father's Decease, is not to be disputed; for all imaginable Care had been taken, to secure the Succession to her, by the Oaths of all the Prelates, and Nobility: And therefore she claim'd it as her Birthright; and would never yield up the quiet Possession of it to *Stephen*. But we have likewise a well grounded Assurance, that she never intended to sit longer in the Throne, than till her Son became capable of the Government. This was probably the Reason, why she would not take upon her the Title of *Queen*, even when her Enemies were at her Feet, and she seem'd to be entirely in Possession of the Kingdom; for upon any other account to have declined a Coronation, considering the Disposition and Temper of those Times, (For, *Angli nisi coronato Regi servire non erant soliti*, says, *Ord. Vitalis*, l. 3. p. 503.) might have proved very prejudicial to her Interest. During the tender Age of her Son, she was contented to endure the Fatigues of a Military Life for several Years; but at length, having lost her two great Supporters, the Earls of *Gloucester* and *Hereford*; and being tired out with Vexations and Disappointments, she resolves to leave *England*, and to spend the rest of her Days in Peace and Quietness with her Husband in *Normandy*. So that now it was plain, the future Prosecution of

of the War against *Stephen*, was wholly devolved upon her Son; and it seem'd but reasonable, that the Crown of *England* should be the immediate Recompence of his Trouble in acquiring it. About two Years after his Mother's Departure, Prince *Henry* landed in *England*, upon the *English* Nobility of his Mother's Party having declar'd, that they would not stir, till he who had the Right, return'd into *England*: On his Arrival, tho' then but Sixteen Years of Age, many of the Nobility discover'd their Inclinations to him; *because, of Right, all belong'd to him; and they were desirous of securing the Rights of the Kingdom to that young Knight.* From which Passages I may infer, that his Mother had actually then made over her Title to him; for how he should have a *Right* upon any other account, is not easy to imagine. He did at that time but shew himself to them, to fix them to his Party, and then went forward into *Scotland*, to the King his Cousin, who also treated with them, as claiming the Crown of *England* in his own Right, and engag'd him by Oath, if he recover'd the Crown, to let him have *Newcastle* and *Northumberland*, and all the Country between the *Tine* and the *Tweed*. In the Beginning of *Janunry* 1150. he return'd from *Scotland* into *Normandy*; and then his Father *Geoffrey* of *Anjou* resign'd up the Dukedom of *Normandy* to him, which Dukedom *Geoffrey* had held in Right of his Wife *Maud*: and therefore it is probable, that at her Instance, at least not without her Consent, he gave it up to her Son *Henry*: And if his Mother was content to resign to her Son her Right to the Dutchy of *Normandy*, of which she and her Husband were then in quiet Possession; we have much more Reason to think, she did resign up to him her Right to the Crown of *England*, which he himself was to be at the Pains of recovering by Force. He stay'd in *Normandy* and *Aquitaine* till the Year 1153, being engag'd in a War with the *French* King; and during that time the War was renew'd and carry'd on in *England*, between King *Stephen*, and the Lords, that stood up against him, to preserve the Rights of the Crown for the young Duke *Henry*: So that it appears, they had then no farther Concern for his Mother; but look'd upon the Right of the Crown as devolv'd on him; to whom, next time he came over into *England*, it was agreed by King *Stephen* himself, that after his Decease it should accordingly descend. And nothing seems to put this Matter more out of question, than the Joy which the Empress *Maud* express'd upon her Son's Return into *Nor-*

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mandy, after he had perfected this Agreement with *Stephen*; an undoubted Sign, that he had done nothing in that Act against her Consent, much less to her Wrong and Prejudice; and yet by that Accommodation, the Succession was settled on the Son, without any manner of Regard to the Mother's Right. And if we consider too, That she was a Princess of a very great Spirit; and her Carrying it so high upon her Victory over King *Stephen*, is a sufficient Proof of it: If she had not resign'd up her Right to the Crown, but sent her Son over only to act in her Name; and he had so far abus'd his Mother, as without her Authority to give away her Right for ever, reserving only the Reversion of the Crown to himself: It cannot be conceiv'd, that we should find nothing related in our Historians, either done or said by the Empress, in Vindication of her own Right; especially if we consider, that *Henry* did not stay in *England* long after the Agreement was made between King *Stephen* and him; but return'd back again soon into *Normandy*, which of all Places one would think he should not have chosen to go to, had he done his Mother, that was there, so great an Injury; nor would she have welcom'd him thither with so much Joy; but rather have shew'd her Resentment, by raising him some Trouble there. Yet we find nothing, but that he liv'd there quietly, without the least Trouble from his Mother; and stay'd there till he was sent for into *England* upon King *Stephen's* Death; and then we have no Ground to imagine, but that his Mother gave him Joy, and wish'd him a good Voyage hither, and a happy Reign: At least, the silence of the Historians, considering her Temper, is a better Argument, that she had given up her Right, than their not mentioning her Resignation; nor producing an Instrument of it, is of the contrary. Besides, we are told, King *Henry* put off his Expedition to *Ireland* by the Persuasions of his Mother; which can never be believ'd by those, who think she resented his Possession of the Crown. And lastly, we have evident Proof, that she took her Son's Part in his Quarrel against *Thomas Becket*. Secondly, That the House

p. 59. of *Scotland* ever laid any Claim to the Crown of *England*, upon the Account of their Descent from *Margaret*, the Sister of *Edgar Atheling*, no where appears; on the contrary, it is an undeniable Truth, that *David* King of *Scotland* (Nephew to *Edgar*) swore to the Empress *Maud's* Succession; asserted her Right to it, to the manifest Hazard of his own Kingdom; and at length, by his steady

steady Adherence to her Cause, and his Fidelity to her Son, with whom he made the Agreement just now mention'd, contributed very much to his Advancement to the Throne. Which Actions, if they were not good Evidences of his having quitted all Pretensions to the Inheritance of *England*, it was certainly impossible for him to give any that would have been good. Thus far I have endeavour'd to clear the History of our Kings, from the Conquest; and perhaps have succeeded in my Design; which was to shew, that the Subjects had Reason to obey them, as Lawful Sovereigns, *Stephen* only excepted, without the Help of the Doctor's Principle. But if I presume too much upon the Strength of my Arguments, I have this Comfort, that the Doctor will not be able to overthrow their Probability at least; which I cannot but think necessary for him in this present Undertaking. For were it only uncertain, whether *William I.* and his Sons, had a Legal Title to the Crown, (without regard to their Possession) this very Uncertainty would be a sufficient Confutation of what he has urged from their Reigns; because his boasted *Constitution* absolutely depends upon the undoubted Existence of Kings *de Facto*, who were submitted to and p. 60. obeyed, for no other Reason, but upon the account of their being in the Throne: But the Doctor cannot be sure, the Subjects did not think themselves bound in Conscience, to pay their Allegiance to these Princes upon other Considerations, besides their *Possession*; and consequently his Cause is far from being secure. He is pleas'd indeed to expect, we should demonstrate the Rights of these Princes; and therefore complains of one of his Answerers, *That he had not proved, that the Subjects submitted to certain Kings* (whom he had called *Kings de Facto*) *upon the Score of Hereditary Right, or of any Right at all, antecedent to their Possession, which* (says he) *of all things he ought to have done.* But by his Leave, his Adversaries will never think it their Duty, to prove the Rights of Princes, more than of any private Men; which, by the establish'd Rules of Equity, ought always to be presumed, and taken for granted, till the Contrary is made evident. On the other hand, none are to be esteemed Criminals without Conviction; and yet such were certainly all Kings *de Facto*; for the Kingdoms then possess'd, did of Right belong to another, from whom they were forced by Violence, and withheld by notorious Injustice. Since the Doctor therefore has thought fit to charge so many of our Kings with this Crime; it becomes him to make it good by undoubted Testimonies

Stimonies and Authorities; otherwile he denies them that Justice, which the Laws of all Countries allow to the meanest Subjects, who are ever reputed Innocent, till the Guilt they are accused of, is clearly detected, and manifested.

The Doctor perhaps may now expect, I should follow him through his whole List of Kings *de Facto*; but since he has not thought it worth his while, to take much Notice of them himself; he will excuse me, if I pass them over with as little Regard: He has been pleas'd indeed to draw an Argument from a Passage in our Homilies relating to King *John*; and (as the Bishop of *Worcester* had done before him) Bishop *Stillingfleet's Unreasonableness of a new Separation*, &c. p. 32, 33.) urges it as a Proof, That the *English* Clergy in Queen *Elizabeth's* Reign, thought Allegiance was due to King *John*, as a Lawful Prince; because they call him the Subject's Sovereign Lord the King; and their Natural Lord the King of England: whereas

p. 61. it is well known, that King *John* was no more than a King in Possession; for *Arthur*, who was his elder Brother's Son, and put up a Claim against him, with his Sister *Eleonore*, who was kept in Prison all his Reign, were nearer in Blood to the Throne, than himself. But let the Doctor be as confident as he pleases; we have very good Authority to affirm, that King *Richard* appointed his Brother *John* his Successor, by which Testamentary Right (according to ancient Custom) he might become a Lawful King, and therefore *John* pretends to have succeeded *Jure Hereditario*. In the next place it appears, that *Arthur* very early submitted to King *John*, and did Homage to him; and I find an Instrument cited out of *Chopinus*, which shews, he acknowledged *John* to be King of England; upon which my Author (*Serjeant Fairfax*) makes the following Reflexion: Truly if *Arthur* had not thought *John* a Lawful King, he would not in time of Enmity so have term'd him; but he must needs repute him a Lawful King, when at *Vernon*, the French King being present, he did Homage to *John*, as to the King of England his Sovereign Lord. Now as the Bishop of *Worcester*, and the Doctor ask, why we may not do as much for any King *de Facto*, as the People of England did for *John*: So I would be informed in my Turn, whether the Subjects could do less, than call him King, and obey him as such; since *Arthur*, the true Heir, had done so before them. And why might not this be the Reason, that the Convocation bestows the Title of King upon *John*; and speaks of him, as a Lawful Sovereign? Besides, the Doctor has been told, that were *John* no more than a King *de Facto*,

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it was still unlawful for the Pope to *curse* him; to *absolve* the Subjects from their Allegiance to him; and give the Kingdom to the Dauphin of France, which are the chief Points the Homilies intended to condemn. For their Design was, to censure the Pope's Interposition in the Affairs of England, and to reject his pretended Authority in disposing of the Obedience of Subjects; and therefore it does not follow, because they disallow of the Barons transferring their Allegiance to the Dauphin, at the Pope's Instigation; that therefore they held it unlawful for them, to prefer *Arthur's* Title to *John's*. But then the Doctor thinks, they would not give *John* the Name of King; much less would they honour him with the Appellation of their Natural Lord and Sovereign, had they not believ'd, that Possession gave him a sufficient Title; for by Descent it was impossible he should have any; *Arthur* and his Sister (his elder Brother's Children) being living. But with all due Respect to the learned Bishop and Doctor, I must take the Liberty to say, they are mistaken, when they affirm, that *Arthur* was alive, when the Barons invited the Dauphin into England; that Prince having been dead fourteen Years before. So that the only possible Bar to King *John's* Title, must be *Eleonore*, *Arthur's* Sister; who was indeed living many Years after *Henry III.* possess'd the Throne. Upon which account (unless King *Richard's* Power to dispose of the Succession be allowed) I shall not pretend to defend King *John's* Possession of the Kingdom, against a Right so manifest, as hers was; which it does not appear, she had ever surrender'd: Tho' I cannot but think it strange, if there had been no manner of Objection against her Title, that neither the Pope, nor the French King, nor the Barons of England, in their frequent Quarrels with King *John*, and his Son, should ever set up that Lady's Claim against them, and reproach them with Injustice to her; which yet they do not seem to have ever done, as far as we can learn from the Histories of those Times; nor indeed does it appear, that *Eleonore* ever laid Claim to the Kingdom. But I am not solicitous about this Matter; and therefore shall, without any Difficulty, agree with the Doctor, that King *John* was no better, than a King *de Facto*, at the Time we are speaking of; his Niece being still living. But is it impossible that the Authors of this Homily should, thro' Ignorance or Inadvertency, think better of King *John's* Title, than it deserved? Might they not believe, that *Eleonore*, as well as her Brother, was then dead; and consequently, that his Right

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was not to be disputed? This Consideration was suggested to the Doctor by one of his Adversaries, but without any Success, for the Doctor thinks it

p. 63. a Reflexion upon the learned Compilers of the Homilies, to imagine, *they were not as well acquainted with the History of that Age, as we.* Now, tho' I will never allow the Doctor to have more Reverence and Esteem for those Authors, than my self; yet I can easily believe, they were mistaken in this Point of History; and my Reason is, because I find them guilty of a much greater Error, in this very Passage, that is now before us. If he will be pleased to cast his Eye upon this Part of the Homilies, he will be sensible, they reproach the *Barons*, &c. with taking up Arms for the *Dauphin* against King *John*, at the Instigation of the Pope; whereas it is a Truth not to be called in Question, (if *Matthew Paris* may be credited) that the Pope discourag'd that Rebellion to the utmost; and at last excommunicated the Promoters and Fomenters of it. The Methods made use of by him to suppress those Insurrections, are so copiously related by that Historian, that it may well seem wonderful, they should slip out of the Memory of the Writers of this Homily; but they might easily be supposed ignorant of the Time, when *Eleonore* died; because she is hardly mention'd by that Author, throughout his whole Account of King *John's* Reign; and when he takes Notice of her Death under *Henry III.* he does it in so few Words, that it might easily escape a diligent Reader's Observation. Lastly, The Doctor insists upon it, that to call *John* King of *England*, and *Natural Lord*, and *Sovereign*, are evident Signs, they thought him to be a *Rightful King*. But this Consequence, as to calling *John* King of *England*, is not so certain, as the Doctor takes it to be;

p. 64. for the Historians, that did not believe *Stephen* had a Right to the Throne of *England*, always give him the Title of *King*; even *Maud* the Empress her self, in her Charter to *Milo* of *Hereford*, styles him King of *England*; tho' at that Time he was her Prisoner. And it is worth observing, that the Scripture tells us, that *Ishboſheb* reigned Two Years, and *Athaliah* Six, but no body will infer from thence, that he was a Lawful *King*, or she a *Queen*: And which is still more remarkable, *David* calls *Abſalom* King; and yet surely he never acknowledged, he was so *de Jure*. I must desire likewise, it may be consider'd, whether the Word *Natural* is applicable to a King *de Facto*; for my Lord Chief Justice

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Coke teaches us, That *Natural Allegiance* is due originally by Nature and Birthright; and he that oweth this, is called *Subditus Natus*; and therefore in an *Indictment of Treason* against J. Dethick, 2d and 3d of Philip and Mary, it ran, *Contra Philip. & Mariam supremos Dominos suos*; where *Naturales* was omitted, because King Philip was not his *Natural Liege Lord*. From whence it seems plain, that King John, having no Title by Birthright, could not properly be called the *Natural Lord, and Sovereign of the People of England*; and therefore the Writers of the Homilies, when they speak of him in those Terms, did delieve he had a Right, by Blood, to the Crown; or else we must say, they did not truly consider the Propriety of that Expression.

I now proceed to the House of Lancaster; and shall examine the several Observations, which the Doctor is pleas'd to think for his Purpose, in the History of that Family. He begins his first Remark with a Reflexion upon the Conduct of Bishop Merks of Carlisle: *Of all the Great Men* (says he) *we meet with in our History, none was more likely to have stood out against the Government of a King de Facto, than that Bishop*; and yet it is certain, that he sat in Henry IV's first Parliament, in which those Acts were past, that we have in the Statute-Book; for it was at the p. 65. Close of that Parliament, he made his Speech in Behalf of King Richard; and some time after pleaded that King's Pardon for a Conspiracy against him, for which he stood condemned to die. And a little after; *It is a great Mistake to think, there were any Nonjurors in the Numerous Party, that espoused the Title of the House of York*; for all the Partizans of that House lived in Submission, and took Oaths of Allegiance to the Three Henrys. Would not any one now conclude from these confident Passages, that the Doctor had Demonstration on his side; and that it could never be disputed, but that this Bishop of Carlisle had acknowledged Henry IV. and sworn Allegiance to him? But there is in Truth no manner of Evidence, that ever this Bishop took an Oath, or submitted to Henry IV. Have we not then good Reason to complain of the Injury done to that Prelate's Memory? And will it not become the Doctor to make him Reparation? It is a hard Case, that a Person, so highly honoured in History, and so much revered by the ablest and most impartial Judges, should at last fall under the Doctor's Censure, for an Action universally applauded, for more than Three Hundred Years; surely the Arguments should be very powerful, that can easily

ruin so well established a Reputation; and nothing but the irresistible Force of Truth could prevail with the Doctor to rob his Country of so glorious an Example of Fidelity and Fortitude. Well; it is in vain to spend Time in Expostulations, if the Matter of Fact is really as he represents it; his Proof of which I shall now consider. Thomas Merks, Bishop of Carlisle (*says he*) submitted to Henry IV. and acknowledged his Authority; for he sat in his first Parliament, &c. But how does it from thence follow, that he must have submitted to Henry IV? The Doctor knew very well, that no Qualifying Oaths were then required of Peers at their Entrance into Parliament; And by a late Example he might have been satisfied, that his Appearance in Parliament (I might call it a *Convention*; for I shall prove it to have been no better by and by) was no Argument, that he approved of their Proceedings:

For he cannot be ignorant, that several of the
 p. 66. *Deprived Bishops* attended some Days in the late Convention; and yet they neither acknowledged the Authority that summoned it; nor concurred with it in its Resolutions. The Doctor adds, *He did not make his Speech, till the Close of the Parliament; and from thence infers, that he was present in the preceding Part of that Session, when many of Richard II's Acts were repealed.* This is just as good an Argument, as the former; in which he takes it for granted, that every Lord gives his actual Consent to every Act, that passes. Besides, how does he know, that this Speech was made at the Close of the Parliament? And if it was, why must it from thence follow, that he was present in the Beginning of it? These are all meer Conjectures, that may as well be denied by others, as they are affirmed by the Doctor; who urges it against this Bishop, *That he afterwards pleaded the Pardon of Henry IV. for a Conspiracy against him, for which he stood condemned to die.* And what is the Consequence the Doctor would draw from thence? Does it follow, that he thereby acknowledged him to be a Rightful King; or engaged himself to be his true and faithful Subject for the future? Might not a Man condemn'd by Cromwell for serving King Charles II. have pleaded a Pardon granted by that Usurper, without the Imputation of owning his Authority? Or is it absolutely necessary in such a Case, that a Man should be hang'd in order to shew his Loyalty? For what other Event can be expected, if he must accept of no Pardon, which, it often happens, must be pleaded, before it becomes effectual? But how comes the Doctor to know, that Bishop Merks
 ever

ever pleaded *Henry IV's Pardon*? In what Writer or History is it to be found? Mr. *Rymer* (to whose Collections he refers his Reader) only gives us the Copy of the *Pardon*, without any Intimation, that he ever pleaded it; so that we are yet to seek for Authority for this Piece of History. It may be, the Doctor thinks, there could be no other Motive for this Pardon, but only the Assurance he had given *Henry IV.* of becoming his good Subject for the future: But why then was it not inserted in the Pardon? Why was that Reason omitted? Instead of which the only Cause assigned for that *Act of Grace*, is the great Reverence that King had for the *Pontifical Dignity* and *Character*. After all, the Doctor thinks this Bishop

inexcusable in taking up Arms; since the Earl of March (for whose Sake only, as Right Heir to Richard II. it was lawful to levy War against Henry IV.) never set up his Claim to the Crown, in all that Reign; and his Exclamation upon this Occasion is not a little insulting: What then becomes of Bishop Merks? But what becomes of the Doctor, if *Richard II.* was alive at that Time, when this Bishop appeared in Arms against *Henry IV.*; is it not then evident, that our exact Historian is subject to the same Frailties he charges upon his Adversaries? Now that *Richard II.* was then alive, is certain from undoubted Authorities: And to put this Matter out of Question, we have the Word of *Henry IV.* himself, in the forementioned Charter of Pardon; in which it is said, the Bishop's Crime was *conspiring with Thomas Blount, Bennet Sealy, Knights, and many others condemned at Oxford, to restore King Richard.* It was *Richard II's* Title therefore, not the *Earl of March's*, which the Bishop was concerned to defend; and consequently his Observation about that Earl's Submission to *Henry IV.* is nothing to his Purpose, were it true. The Author concludes his Defence of Bishop Merks, with that short History of him, which my Lord Chief Justice Coke has inserted in his *Institutes*. At the Parliament holden the First Year of *Henry IV.* on the first Thursday after the Bishop of Canterbury had willed the Lords, that in no wise they should disclose any thing, that should be there spoken; the Earl of

Northumberland demanded of the Lords, what were best to be done for the Life of *Richard II.* Thus far are the Words of the Roll of the Parliament. At this Time spake that worthy Prelate John (it should be Thomas) Merks, Bishop of Carlisle; and said, That they ought not to proceed to any Judgment against King Richard, for Four Causes. First, That the Lords had no Power to give Judgment upon him,

that was their Superior, and the LORD's Anointed. Secondly, That they obey'd him for their Sovereign Lord and King Twenty Two Years, or more. Thirdly, If they had Power to give Judgment against him, they ought in Justice to call him to his Answer; for that (said he) is granted to the cruellest Murderer; or errantest Thief in ordinary Courts of Justice. Fourthly, That the Duke of Lancastre had done more Trespasse to King Richard and his Realm, than King Richard had done to him or them, &c. and desir'd, that if they would proceed against him, the Names of them, that so would proceed, might be entred into the Parliament Roll. It is true, that the Parliament Roll omitteth this Speech of the Bishop; but it appeareth by the Parliament Roll, that the Lords proceeded against King Richard, and adjudged him to perpetual Prison; whose Life they would by all means to be saved, as the Roll reporteth. The Names of the Bishops, and Lords, and Knights, that assented, are set down, as the Roll of the Parliament reports; so as it seemeth, that the stout and resolute Speech of the worthy Bishop wrought some Effect. For this Speech he was arrested by the Earl Marshal; and being for a small time committed to the Custody of the Abbot of St. Albans, was soon delivered. Against him never any Judicial Proceeding was had for this Speech in Parliament. But this

P. 69. Bishop, transported with Excess of Zeal, and affectionate Desire of the Enlargement and Restitution of King Richard, was Party and Privy to the Conspiracy of Thomas Holland Earl of Kent, John Holland Earl of Huntington, John Montacute Earl of Salisbury, Edward Earl of Rutland, Thomas Lord Spencer, &c. for which he was indicted of High Treason, arraign'd, try'd, and had Judgment, as in Case of High Treason; but the King pardon'd him, and set him at Liberty. Such was the Opinion this great Lord Chief Justice had of Bishop Merks; in Consideration of which, together with the other Remaks I have now made upon his Case, I shall believe he never swore Allegiance to Henry IV. notwithstanding the Doctor's Confidence, that there were no Nonjurors in his Reign. I shall only add, that tho' the Doctor is pleased to censure this Bishop's Appearance in Arms against Henry IV. as a Breach of his Oath, and an Act of Rebellion; yet the Records of Parliament speak of it in a different manner; for there (Rot. Parl. 1 Edw. 4. § 32.) it is said, That all those, that levied War with the Earl of Salisbury, the Lord Dispenser, &c. did therein perform their Faith and Allegiance to their Liege Lord King Richard, according to their Duty to GOD, and to the Laws and Customs of the Realm of England.

And

And now (*says the Author*) the Doctor must give me Leave to complain a little of his Severity to his Adversaries; for he has impos'd it as a Task upon them, *That they should prove, there were any Nonjurors in the Time of his Kings de Facto*: And with much Assurance he seems to boast, that they had not succeeded in their Attempt. This is a rigorous Exaction, and unworthy of the Doctor's Equity and Moderation; for at this rate we must be oblig'd to prove Men's Honesty and Innocence, which by the established Rules of Justice ought always to be presumed. Besides, we are at present in Possession; (a Consideration, which ought to be of some Weight with the Doctor) for till he was pleas'd to cast the first Stone at this worthy Bishop, a clearer Character had never been transmitted in History, than what he enjoy'd; and that purely upon the Account of his Loyalty and Fidelity to his Rightful King. We may therefore take it for granted, that he really was, what he has hitherto been represented, to be a *Man of Conscience and Integrity*; and leave it to the Doctor's Skill and Management, to give Light to those Spots and Blemishes, he pretends to have discovered in him. For the same Reason I may be allow'd to believe, there were many more *Nonjurors* among the great Men, that took up Arms against *Henry IV.* or lived in his Reign, till the Doctor produces his strong Arguments to the contrary. But, that I may not omit any thing, necessary for the Doctor's Satisfaction; I will give him another Instance of an eminent Person, who chose to lose a great Employment, rather than submit to *Henry IV.* as his Lawful King; and that was *Sir John Cary, Chief Baron of the Exchequer*, at the Time of *Richard II's* Deposition; who was banish'd by that Prince for no other Reason, but because he would never own his Authority. I may likewise add, that several Clergymen were in Arms against *Henry IV.*; and the *Friars Minors* did generally favour that King's Enemies: Now I should think it allowable to call these *Nonjurors*; since in those Days the Inferior Clergy were not oblig'd to take Oaths of Allegiance. Upon which account, I must confess, it is not a little surprizing to me, to find the Doctor so often calling upon his Adversaries, to produce the Names of *Nonjurors* throughout the Reigns of his *Kings de Facto*; as if every individual Subject had been oblig'd to take the Oath of Allegiance in those Days; or all those, that had taken it, were influenced by the Doctor's Principle, that *Allegiance is due to every*

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King in Possession; the contrarry to which Assertion I have already, in some Measure shewn; and shall do it more fully in the Sequel of this Discourse. The Doctor indeed would persuade us, that *William the Conqueror made every Inhabitant in England do Homage, and swear Fealty to him*. But if he had given himself Leave to consider fully of this Matter, he would have been satisfied, that *Ingulfus* could not mean, that all Persons, without Exception took these *Oaths of Fealty*; but only the King's principal Tenants, and other *great Men*, who held Lands upon Secular Services, and therefore were called *Homines Regis*: That is, such only, as had Lands described in *Doomsday Book*. Now it is certain, the Interior Clergy were bound by none of these Tenures; but held, whatever Lands and Possessions they had, in *Frank Almoigne*; (that is *Free Alms*) by Vertue of which they were excused from *Fealty*, and all manner of Services, besides that of Praying for their Patrons. This Privilege was afterwards secured to them by the Fourth *Lateran Council*, under *Innocent III*; and that Council being received, and approved of in the Council of *Oxford* (held under Archbishop *S. Langton*, and ratified by King *Henry*) the Clergy were never disturbed in the Enjoyment of these Rights, till the Times of the *Reformation*: So that there could be no *Nonjurors* among the great Body of the Clergy of *England*, under any of the Doctor's Kings *de Facto*. Had the Clergy of *England* enjoy'd this Privilege at the Time of the late *Revolution*; near Four

Hundred of them had quietly continued in the Possession of their Livings, of which they were for no other Reason deprived, but because they were *Nonjurors*: And might not the next Age then have demanded, as the Doctor does of the Times beforementioned, *Who were the Nonjurors at the Revolution*? Neither were the Clergy the only Persons exempted from taking Oaths of *Fealty* in the *Conqueror's* Reign; but also all those, that held Lands in *Allodio*, of which we meet with frequent Mention in *Doomsday Book*. Besides, who were these *great Men*, that did *Homage* to the *Conqueror*? The *Bishops and Abbots*, &c. mentioned by *Hoveden* to have sworn to him at *Salisbury*. Had they been *Saxons*, it might have serv'd the Doctor's Purpose, supposing him to be only a King *de Facto*: But it is worth observing, that this happen'd towards the latter End of his Reign; at which Time all the old *English* Inhabitants of Note had been dispossest in a manner of their Estates and Fortunes; and the

Normans

Normans were generally seized of the Lands of the Kingdom, together with all the great Offices and Employments, Ecclesiastical, as well as Civil. This is so notorious a Truth, that none can be ignorant of it, that are but slenderly acquainted with the Historians of that Time. Lastly, It should be consider'd, that many of the *English* Nobility and Gentry, voluntarily left the Kingdom in the Beginning of that Prince's Reign, before the Time, in which he is said to have tender'd the Oaths to his Subjects. A great Part of them fled into *Scotland*; some into *Denmark* and *Ireland*; and others went to *Constantinople*; where they were well receiv'd, and kindly entertain'd by the Emperor *Alexius*. Now I leave it to the Doctor to judge, whether all these voluntary Exiles may not properly be esteem'd *Nonjurors*, since they chose to leave their Country rather, than they would submit to the *Conqueror*. But supposing it to be true, that every Man in *England* had taken the Oaths to the *Conqueror*, and those of his Successors, whom the Doctor calls *Kings de Facto*; is he sure they did this upon a full Persuasion and Conviction, that Allegiance was due to them upon the Sole Account of their being in the Throne? The Doctor knows very well, that many of the chief Nobility, and great Numbers of the Gentry were in Arms against *Henry IV.* chiefly for this Reason, because he was not their *lawful King*. Now this was a plain Declaration, that they thought the Oath they had taken to him, did not oblige them; and consequently it is evident, they had no Notion of the Doctor's Constitution. When Men take up Arms

p. 73.

against the Government they have liv'd for some Time peaceably under, they have always thought it prudent to justify such Actions by plausible Pretences; and, I believe, it will be hard to instance in any Insurrection, which has not appeal'd to Law and Equity, for Countenance at least, if not Encouragement. But if the Doctor's Opinion is to prevail, there could not be a more impudent Rebellion, than that, which was maintained against *Henry IV.* since it was grounded upon this *illegal Position*, That he was not King *de Jure*, though he was in full Possession of the Kingdom. Upon this Presumption therefore, that Men cannot act so contrary to the Principles of common Sense, as to engage in a Conspiracy against an establish'd Government, upon Reasons notoriously contradictory to that Constitution they pretend to maintain; the Doctor's Adversaries have taken the Liberty to affirm, that his Doctrine

was not known in *Henry IV's* Reign: And what now does the Doctor answer to this? Why, he tells us, *First*, That it could be no better, than a sham Pretence, if ever made use of by them; for the Right Heirs had all submitted to *Henry IV*; and therefore certainly it was no small Crime for Subjects to begin a War with their Prince, and throw a Nation into Blood and Confusion, when they had no Reason for it; and this was what they did, and what they had no Reason to do, &c. And, *Secondly*, He says, that *Owen Glendor*, the Earl of *Northumberland*, &c, did not make War against *Henry IV*. for the Sake of the Right Heir, but upon quite different Motives. *First*, He affirms, that the Right Heirs to the Crown had all submitted to *Henry IV*; and therefore the Taking up Arms against him upon the Pretence of their Title, was unreasonable, and unjustifiable. But did the Doctor consider, that the first Conspiracy against *Henry IV*. was during the Life of *Richard II*, in order to restore him to the Crown? And will he say, that the Resignation made by that Prince, during his Imprisonment, was free and voluntary, and such as ef-

p. 75. fectually released his Subjects from their Allegiance to him? I know very well, that *Richard II*. was prevail'd with to declare, that his Resignation was voluntary; and I am not ignorant, that it is thus enter'd upon the *Rolls of Parliament*: But I have a better Opinion of the Doctor, than to believe, he will so far approve of that infamous Act of Violence and Injustice, as to attribute any Authority to it; if he should, I must refer him for his Satisfaction, to the Records of Parliament, where he will find the following remarkable (*Rot. Parl. 1. Edw. 4.*) Passages, very worthy of his Regard; and therefore fit to be frequently recommended to his Consideration. And where certain Persons of evil, riotous, and seditious Disposition, joyed in Rumour and rebellious Novelties, adhering to *Henry IV*. late in Deed, and not of Right, King of England, after his Unrighteous, Unlawful, and Detestable Usurpation and Intrusion, against his Faith and Legiance to King *Richard II*. his Righteous, True, and Natural Liege Lord, murder'd with great Cruelty and horrible Violence, in an outrageous and heady Fury, the Right Noble and Worthy Lords, *John Montacute*, late Earl of *Salisbury*; and *Thomas*, late Lord *Le Despenser*, and other true Subjects and Liegemen of the said King *Richard*, &c. Item. *Ralph Lumley*, and others, were cruelly slain and murder'd by *Henry IV*, in Deed, and not of Right, King of England, for the true Faith, Duty, and Allegiance that they bare to the Right Noble Prince King *Richard*

chard II, &c. By Virtue of which Authorities I shall venture to say, that those, who took up Arms for *Richard II.* (notwithstanding his pretended Resignation) had a good and righteous Cause; and therefore the Doctor has unjustly cast upon them the Aspersions of being *seditions*, and *unreasonable Men*. Well; but after *Richard II.*'s Death, he is confident the following Insurrections against *Henry IV.* were not capable of any Justification; for the *Earl of March* (the only Person who could pretend to a Right to the Crown) never laid any Claim to it: So far from it, that he took the field for *Henry IV.* against *Owen Glendor*; a Sign he had surrender'd his Title. Now, with all the Doctor's Accuracy, I am afraid he is unfortunate in this Piece of History: For *Roger Earl of March* dying at the End of *Richard II.*'s Reign, his eldest Son *Edmund* was then but Six Years old; and consequently p. 76. under Ward all *Henry IV.*'s Reign: And *Sir William Dugdale* tells us farther, that he was but Ten Years old, when he headed the *Herefordshire Men* in Opposition to *Owen Glendor*; an Age certainly too young, to render the Resignation of a Crown of any Validity. Besides, why must the *Earl of March*'s Heading an Army against *Owen Glendor*, be necessarily interpreted, as a Declaration in Favour of *Henry IV.*'s Title? The Doctor should remember, that King *Henry* was not of his Opinion; for when he was ask'd to ransom the *Earl of March*, (who had been taken Prisoner by *Owen Glendor*) he made Answer, That the *Earl of March* was not taken Prisoner for his Service; but willingly suffer'd himself to be taken Prisoner, because he would not act against *Owen Glendor*; and therefore he would not redeem him. But to put this Matter out of Dispute; we have an Act of Parliament (Rot. Parl. 1. Edw. 4) upon Record, which expressly commends those, who (after King *Richard*'s Death) continued their Faith and Liegeance, according to their Duty to GOD, and to the Laws and Customs of the Realm of *England*; to *Edmund Mortimer*, then *Earl of March*, next Heir of Blood to the same King *Richard*. And likewise it is there said, that *Ralph Lumley* and others were cruelly slain and murder'd by *Henry IV.* in Deed, and not of Right, King of *England*, for the true Faith, Duty and Allegiance, that they bear to the Right Noble Prince King *Richard II.* in his Days; and after his Decease, un- p. 77. to *Edmund Mortimer*, late *Earl of March*, &c. I leave it now to the Doctor to consider, whether those Noblemen, who took up Arms in Defence of the *Earl of March*'s

March's Title, were guilty of no small Crime, and had no reason for so doing? Secondly, He maintains, that Owen Glendor, the Earl of Northumberland, &c. did not make War against Henry IV. for the Sake of the Right Heir; but upon quite different Motives. Let us now therefore enquire into the Truth of this Assertion. He says, That Owen Glendor's War began with a Riot, and ended in Rebellion. Now, though I am not at all concerned, whether this be true or no; yet if any thing can be said in that Welsh Gentleman's Vindication, I hope I may do him Justice without Offence. I shall beg leave therefore to recommend the Perusal of the following Passage, extracted out of the Notes of the Learned and Judicious Antiquary, Robert Vaughan of Hengwrt Esq; ' Sir David Gam was ' wholly devoted to the Interest of the Duke of Lancastre; ' upon which Account it was, that Owen ap Gryffydd Vychan ' (commonly called Owen Glyn-Dŵr) was his mortal Enemy. ' This Owen had his Education at one of the Inns of Court, ' and was preferr'd to the Service of King Richard II, ' whose Scutifer (as Walsingham says) he was. Owen being ' assured, that his King and Master Richard was Deposed ' and Murder'd, and withal provoked by several Affronts, ' and Wrongs done him by the Lord Grey of Ruthin his ' Neighbour, whom King Henry very much countenanced ' against him, took Arms; and looking upon Henry as an ' Usurper, caused himself to be proclaim'd Prince of Wales.

And tho' himself were descended paternally
 p. 78. ' but from a younger Brother of the House of
 ' Powis; yet (as Ambition is ingenious) he finds
 ' out a Way to lay Claim to the Principality, as descended
 ' (by a Daughter) from Llewellyn ap Gryffydd, the last Prince
 ' of the British Race. He invaded the Lands, burnt and
 ' destroyed the Houses, and Estates of all those, that fa-
 ' voured and adhered to King Henry, &c." (See Mr.
 Lhwyd's Additions to Brecknockshire, in the last Edition of
 Camden's Britannia.) If this Account may be rely'd on;
 whatever Rebellion Owen Glendor was guilty of, certainly
 it could not be against Henry IV; for he never own'd him
 for his King; much less did he ever swear to him. And it
 is observable, that in some of those Papers, signed by him
 as Prince of Wales, (which are preserved by Mr. Rymer, in
Fœdera, &c.) he never calls him other, than Duke of Lanca-
 stre. With respect therefore to Henry IV, he was truly a
 Non-juror; and cannot be charged as a Revolter; a Name,
 which the Doctor thinks he has a Right to bestow upon
 all, that took up Arms in this Reign. It may be said in-
 deed

deed, that his Taking upon himself the Title of *Prince of Wales*, and dating all his Writings according to the several Years of his *Principatus*, was no less, than an Invasion of the Sovereignty of the Kings of *England* over *Wales*; and therefore may well be term'd an Act of Rebellion: But if it was so, he was answerable for it only to the Earl of *March*, to whom only he could be a Rebel, and not to *Henry IV.* And then it deserves to be consider'd, whether the Earl of *March's* voluntary Surrender of himself to *Owen*, (if *Henry IV.* himself is to be credited) and the good Correspondence between that *Welsh* Gentleman and my Lord *Percy* (the professed Friend of the said Earl,) may not amount to a Probability, that he presum'd upon the Rightful Heir's Consent (as far as he was then capable of giving it) for assuming that high Title. If this Point is allowed me, I shall then think it no longer a Question, whether his Quarrel against *Henry IV.* was chiefly founded upon that King's Usurpation; which the Doctor has thought fit utterly to deny. From all which, I may justly infer, that the *Welshmen* at that Time were a very formidable Body of *Nonjurors*; being entirely united in their Enmity against the House of *Lancastre*, not only in *Wales*, but in every Part of *England*, where they resided. For we find it complain'd of in Parliament, that the *Welsh* Scholars in both Universities, left their Colleges; and the Apprentices in *London*, and elsewhere, their Masters, in order to engage themselves in the Quarrel of *Owen Glendor*. And a few Years after, *John Trevor*, Bishop of *St. Asaph*, approved so well of his Countrymens Cause, that he deserted *Henry IV.* upon that Account.

Before I conclude this Story of *Owen Glendor*, p. 80. I beg Leave to correct a Mistake concerning him, which all our common Histories have fallen into; and that is, as *Holinshed* relates, p. 536. and *Stow* p. 338, "That in the Tenth Year of King *Henry's* Reign, *Owen Glendor* being driven to such Misery, that in a manner he despair'd of all Comfort; he fled into desert Places, and solitary Caves, where being destitute of all Relief and Succour, dreading to shew his Face to any Creature; and finally, lacking Meat to sustain Nature, for meer Hunger and Lack of Food, he miserably pin'd away and died." Now we have very good Evidence, that this Story is false; for in the 11th Year of *Henry IV.* we meet with Orders to march against *Owen Glendor*, and attack him: And in the 13th of the said King a Commission is issued

issued out for the Redemption of *David Gamme* Esq; at that Time *Owen's* Prisoner. Besides, we are well assured, he survived this Prince, and continued his Hostilities against his Successor; for in the third Year of *Henry V.* a Commission was issued out for a Treaty with him and the *Welsh*, in order to bring them to Obedience; and about half a Year after, the same Commission is renewed to *Sir Gilbert Talbot*, in order to the Pacifying of the said *Owen*, and the *Welsh* Rebels, by Offers of Pardon. Thus it is manifest *Owen Glendor* was in no despicable Condition in the Middle of *Henry V's* Reign: How long he afterwards lived, and in what Circumstances he died, no Histories do inform us: But there is Reason to believe, he never made his Submission to the House of *Launcestre*; because in *Henry VI's* Reign a severe Act of Parliament passed, in which

p. 81. his Crimes are recited, and all Indictments, Judgments, &c. made or given against him, are confirmed.

In the next place, the Earl of *Northumberland*, his Son *Hotspur*, and the Earl of *Worcester* his Brother, fall under the Doctor's Indignation; for he does not scruple to charge their Revolt from *Henry IV.* with Ingratitude, and Envy: And is very positive, they did not act upon Principles of Loyalty to the Right Heir. This must be confessed to be an Accusation highly reflecting on the Honour of that very illustrious and noble Family. *Hotspur* especially methinks, might have challenged some Reverence from the Doctor, whose Valour is still remember'd with Pride by his Countrymen, and well deserves to be immortal. The Doctor, however, is resolved to give him no Quarter; but as he is the first Enemy, that durst use him so contemptuously; I doubt not, but he will have Reason to repent of his Error, which I shall now endeavour to make him sensible of. In order to this, the Author begs leave to lay before the Reader an Extract taken from a Manuscript Copy of *John Harding's* Chronicle, omitted in the printed Edition of that Author; which he has taken out of BIBLIOTH. HARLEY, 42. c. 11. Fol. 152. and which together with some additional Observations, will He imagines, not a little contribute to the Vindication of those noble Lords. The Extract is as follows. "Forasmuch as many Men mervaille gretely, why the Erle of *Northumberland*, and "Sir *Henry Percy* his furst begottyn Son, and *Sir Thomas Percy* Erle of *Worcester*, were Supporters to King *Henry IV* "to have his Heritage, and to take King *Richard* to have "depose him by strong Honde: Truly I the Maker of this

" Book

" Book was brought up fro Twelve Year of Age in Sir
 " *Henry Percy's* House to the Battle of *Shrewsbury*; where
 " I was with him armed of Twenty Five Yere of
 " Age; as I had been before at *Homyldon*, *Coke-* p. 82.
 " *lawe*, and at divers Rodes and Fields with him;
 " and knew his Intent, and had it wretyn. Wherefore I
 " have tited in this Book, that for Truth the Cause, why
 " they rose agenst him, may evermore be know. Their
 " Quarrell was so sweet, devout, and by good Advyse and
 " Counseill of Master *Richard Scroop*, Archbishop of *York*
 " (for whom GOD Almighty hath shewn many Miracles
 " sith that Time hitherward) and also by Counseill of di-
 " vers other Lords, that disteyned him, and were bound
 " to him by their Letters and Seals, which I saw and had in
 " keepyng, while I was with him. And all their Quarrell
 " they sent unto King *Henry* in the Field, wretyn under
 " the Seales of their three Arms, by *Thomas Knayton* and
 " *Roger Salvayne* Squyers of Sir *Henry Percy*, which Quar-
 " rell now followeth next after. ' We *Henry Percy*, Earl
 " of *Northumberland*, Constable of *England*, and Warden of
 " the West-Marches towards *Scotland*; *Henry Percy* our
 " first born Son, Warden of the East-Marches of *England*
 " towards *Scotland*, and *Thomas Percy* Earl of *Worcester*, Pro-
 " curators and Protectors of the Commonwealth before
 " our LORD JESUS CHRIST our Supreme Judge; Do
 " say and affirm, and intend to prove personally with our
 " Hands on this instant Day against thee *Henry* Duke of
 " *Lancastre*, together with thy Accomplices and Followers,
 " unjustly calling thy self King of *England*, without a Title
 " of Right, but only by the Treachery and Violence of
 " thy Party: That when thou after thy Banishment didst
 " enter *England*, and camest to *Doncastre*, thou didst then
 " swear to us upon the Holy Gospels, then by thee touched
 " and kissed, that thou wouldest in no wise claim the King-
 " dom or Royal State, but only thy own proper Inheri-
 " tance, and thy Wife's in *England*; and that *Richard*, who
 " was then our Lord the King, should reign for the Term
 " of his Life, being directed by the good Advice of the
 " Lords Spiritual and Temporal: But thou didst impri-
 " son thine and our King in the Tower of *London*,
 " until he resigned through Fear of Death, his King-
 " doms of *England* and *France*, and renounced all his Right
 " in the foresaid Kingdoms, and other his Lordships and
 " Lands beyond the Seas. By Colour of which
 " Resignation and Renunciation, by the Advice p. 83.
 " of thy Adherents, and the publick Cry of the

Common

Common people, brought together to *Westminster* by thy Means, and the Help of thy Accomplices, thou didst there crown thy self King of the foresaid Kingdoms, and didst cause all the Royal Castles and Lordships to be seized into thy Hands. Wherefore thou art false and perjur'd.

Item, We say and affirm, and do intend to prove, That whereas thou didst swear to us upon the Holy Gospels, at the same Time and Place, that thou wouldst never permit any Tenths to be levy'd of the Clergy, nor Fifteenths of the Laity, nor any other Taxes to be raised in the Kingdom of *England* for the King's Use, whilst thou livedst, but by the Consent of the Three Estates in Parliament; and this only upon a pressing Occasion, for the Defence of the Realm, and not otherwise. Thou, on the contrary, in Contempt of thy Oath so taken, hast caused to be levied very many Tenths and Fisteenths, and other Impositions and Taxes, as well of the Clergy and Laity, meerly through a Dread they had of thy Royal Majesty. Wherefore thou art false and perjur'd.

Item, We say and affirm, and do intend to prove, That whereas thou didst swear unto us upon the said Gospels, at the same Time and Place, that our and thy Lord, King *Richard*, should reign as long as he lived in the Enjoyment of his Royal Prerogatives; thou didst cause our and thy Lord King *Richard*, traiterously in thy Castle of *Pontfract*, without the Consent or Judgment of the Lords in the Kingdom, for fifteen Days and Nights a (Wickedness not to be heard by Christians without Horror) to remain in Hunger, and Thirst, and Cold; and thereby didst kill and murder him. Wherefore thou art false and perjur'd.

Item, We say and affirm, and do intend to prove, That thou at that Time, when *Richard* our and thy King was so put to Death in that horrible manner, as is before related; thou didst seize and usurp the Kingdom of *England*, with the Name and Honour of the Kingdom of *France*, contrary to thy Oath; from *Edmund Mortimer*, Earl of *March*, the then next and direct Heir of *England* and *France*; who Immediately and Hereditarily after the Decease of King *Richard*, ought to have succeeded. Wherefore thou art false and perjur'd.

Item, We say and affirm, and do intend to prove, as above; That whereas thou didst swear at the same Place and Time, to support and maintain the Laws and good Customs of the Kingdom of *England*; and afterwards, at the Time of thy Coronation, didst again swear to keep and preserve them inviolably; thou treacherously and against the Law

' Law of *England*, didst write to thy Fautors in every Coun-
 ' ty in *England*, to choose such Knights for each Parlia-
 ' ment, as should be agreeable to thy Pleasure: So that
 ' in those thy Parliaments no Justice could be obtain'd a-
 ' gainst thy Will, upon any Complaints; altho' we had
 ' very often petitioned thee, according to the Consciences
 ' GOD had given us; for the Truth of which we call
 ' GOD to witness; and the venerable Fathers *Thomas A-*
 ' *rundell* Archbishop of *Canterbury*, and *Richard Swope* Arch-
 ' bishop of *York*. Wherefore it behoves us to seek for Re-
 ' medy, before our Lord JESUS CHRIST, by a strong
 ' Hand. Item, We say and affirm, and do intend to prove,
 ' That whereas *Edmund Mortimer* was taken by *Owen Glen-*
 ' *dor* in mortal Fight, and cruelly by him held in Prison
 ' and Iron Chains, in thy Cause; whom thou didst proclaim
 ' to be taken treacherously, and would'st not suffer him to
 ' be ransom'd, either by thy self, or by us his Kinsmen,
 ' and Friends; whereupon we have lately treated with the
 ' said *Owen* for his Redemption, at our own proper Cost,
 ' and for the Benefit of Peace between thee and him; upon
 ' which Account thou didst consider us as Traitors; and
 ' for the future didst secretly contrive our Ruin and final
 ' Destruction. For these Reasons we do mortally defy
 ' thee, and thy Accomplices, and Adherents, as Traitors,
 ' and Subverters of the Commonwealth, and Kingdom;
 ' and Invaders, Oppressors, and Usurpers of the Rights of
 ' the true and direct Heir of *England*, and *France*; and we
 ' intend to prove it this Day by the Force of our Arms,
 ' Almighty GOD affording us his Assistance.

To these Articles *John Harding* immediately subjoins
 the following Lines. ' Forasmuch as many Men
 ' have been inrerred, and yet stonde in grete Er- p. 85.
 ' roure and Contraversty; holding Opinion fro-
 ' ward, how that *Edmonde Erle of Lancastre, Leicestre, and*
 ' *Derby*, was the elder Son of Kyng *Henry III.* croukebacked,
 ' unable to have been Kyng, for the which *Edward* his
 ' younger Brother was made Kyng by his Assent, as some
 ' Men have alleged, by an untrew Chronicle feyned in the
 ' Time of Kyng *Richard II.* by *John of Gaunt* Duke of
 ' *Lancastre*, to make *Henry* his Son Kyng, when he saw
 ' he might not be chose for Heire appariant to Kyng *Richard*. So it is, that I *John Harding*, the Maker of this
 ' Booke, herde the Erle of *Northumberland*, that was slain
 ' at *Bramham-Moor*, in the Time of Kyng *Henry IV.* saie,
 ' how the same Kyng *Henry*, upon St. *Mathew* Daie, afore
 ' he was made Kyng, put forth that same Chronicle, claim-
 ' ing

ing his Title to the Crown by the seid *Edmonde*, upon
 which all the Chronicles of *Westmynstre*, and of all other
 notable Monasteries, were had in the Council of *West-*
minstre, and examined among the Lords, and proved well
 by all their Chronicles, that the Kyng *Edward* was the
 elder Brother, and the seid *Edmonde* the younger Bro-
 ther, and not Croukebacked, nother maymed, but the
 seemliest Person of *England*, except his Brother *Edward*.
 Wherefore that Chronicle, which Kyng *Henry* so put
 forth, was adnulled and reproved. And then I herde the
 seid Erle saie, that the seid Kyng *Henry* made Kyng *Richard*,
 under Dureffe of Prison, in the Toure of *London*,
 in fere of his Life, to make a Resignation of his Right
 to him; and upon that a Renunciation of his seid Right;
 and they were declared in the Counsell: And in the
 Parliament at *Westmynstre*, on the Morrow of St. *Michael*
 then next following, what of his Might and his Wilful-
 nesse, and what by certain Lords and Strength of the
 Commous, he was crowned against his Oath made in
 the *White Freers* at *Doncastre*, to the seid Erle of *Nor-*
thumberland, and other Lords against the Will and Coun-
 sell of the seid Erle, and of his Son, and of Sir *Thomas*
Percy Erle of *Worcester*. For which Cause they died after,
 as I knew well; for that time I was in the Field at
Shrewsbury with Sir *Henry Percy*, of the Age of Twenty
 Five Yere, armed, and afore brought up in his House,
 of Twelve Yere Age. Also I herde the seid
 p. 86. Erle of *Northumberland* saie divers times, that
 he herde Duke *John* of *Lancastre*, among the
 Lords in Counsell, and in Parliaments, and in the Com-
 mon-House among the Knights chosyn for the Commons,
 aske by Bill, for to have been admytted Heire appa-
 raunte to Kyng *Richard*, consideryng how the Kyng was
 like to have no Issue of his Body. To the which the
 Lords Spirituell and Temporell, and the Commons, by
 whole Advyse seid, that the Erle of *Marche*, *Roger Mor-*
timere, was his next Heire to the Crown, of full Descent
 of Blood, and they wolde have none other; and asked
 a Question upon it, who durst disable the Kyng of Issue,
 he being young, and able to have Children? For which,
 when the Duke of *Lancastre* was so put by, he and his
 Counsell feyned, and forged the seyde Chronycle, that
Edmonde should be the elder Brother, to make his Son
Henry a Title to the Crowne; and wold have had the
 seide Erle of *Northumberland*, and Sir *Thomas Percy* his
 Brother of Counsaile thereof, for cause they were descen-
 dyd

' dyd of the seid *Edmonde* by a Sister; but they refused
 ' it. Which Chronycle so forged, the Duke did put in
 ' divers Abbaies, and in Freers, as I herde the seid Erle
 ' oftentimes saie, and record to divers Persons, for to be
 ' kept for the Inheritance of his Son to the Crowne; which
 ' Title he put furthe after he had Kynge *Richard* in the
 ' Toure; but that Title the Erle *Percy* put aside." Upon the
 Perusal of the foregoing Transcript, the Author persuades
 himself, the Reader will be thoroughly convinced, *First*,
 That the Doctor is much mistaken, when he says, that
 the Family of the *Percys* did not take up Arms for the
 Sake of the Right Heir; since the above-written Articles
 abundantly shew, that they had the Interest of the Earl
 of *March* entirely at Heart; and were chiefly animated to
 that hazardous Enterprizes by a Sense of the In-
 jury done to him, and a full Conviction, that p. 87.
 that it became them to venture every thing, in
 order to procure him Justice. *Secondly*, It is from hence
 evident, that they charge *Henry IV.* with a Breach of his
 solemn Oath to them, by which he had obliged himself
 never to attempt any thing against the Right, Honour, or
 Safety of King *Richard*; upon Confidence of his due Per-
 formance of which Oath, they came to his Assistance. So
 that here is an *Original Contract* pleaded, by the Violation of
 which, on the King's part, the Earl of *Northumberland* and
 his Family thought themselves entirely released from all
 manner of Obligations to him. They declare, it was ne-
 ver their Intention to deprive *Richard II.* of his Crown;
 but that on the contrary, it was their constant Resolution,
 to maintain him in the Throne, and after his Decease to
 assert the Title of the True Heir: That *Henry* therefore
 was guilty of Perjury by usurping the Crown, and there-
 fore forfeited all manner of Right to their Service. Out
 of a Sense of this their Duty to King *Richard*, and the Earl
 of *March*, they opposed, as far as they were then able,
 the Duke of *Lancastre's* Coronation; but finding them-
 selves incapable of making any effectual Resistance, it must
 be acknowledg'd, they submitted with the rest, and liv'd
 some Years in Obedience to him, as their King; and if
 the Doctor will have it so, swore to him too. But if this
 was an unjust Oath; if they themselves thought it so, when
 they took it, (as is evident from the Articles beforemen-
 tioned) will the Doctor blame them for not keeping it?
 He will say perhaps, they were inexcusable then in taking
 it; if they knew it to be an unrighteous Oath: I cannot
 help that; neither will it be worth the Doctor's while to

insist upon it; since the main Point in Controversy now between us is, Whether they may be justified for taking up Arms against *Henry IV*? However, that I may omit nothing, which may be serviceable for the Defence of that noble Family; I desire Leave to put him in mind of a certain Principle, generally received in the Times we are speaking of, and which had a prevailing Influence over the great Men of this Kingdom, whenever they found themselves in Danger; and that was, that all Actions done through Fear of Death, were pardonable at least,

p. 88. if not lawful. And it cannot be denied, but our

Courts of Justice had been so favourable to Pleas of that Nature, before *Henry IV*'s Reign, that great Encouragement had been given for the frequent Use of them. After the Battle of *Evesham*, when the famous Act (49 *Hen.* 3.) was made for the Settlement of the Kingdom, called *Dictum de Kenilworth*; those that had been drawn in to assist the Barons against the King through Fear, had but a small Fine set upon them. And in *Edward III*'s Reign, when *Walter de Alington* and his Confederates had forced some Persons, and made them swear to defend the Prizes they had taken; the Court admitted these Persons to bail, and dismissed them soon after. But the most remarkable Instance to this Purpose happen'd in the Beginning of this very Reign, which is now under our Consideration; for when the Judges, who had given illegal Advice to *Richard II.* (and thereby were the Occasion of some Acts that passed in the Twenty First Year of his Reign) were called to account for it in *Henry IV*'s Parliament; they made use of this Excuse, That whatever they did, was for Fear of Death. Upon which the Commons presented this memorable Petition: *Item*, 'Your Commons pray, that neither the Lords Spiritual or Temporal, nor the Justices, may be allow'd for the future to excuse themselves, by saying, they did not dare to act or speak according to Law, and as their true Meaning was, for Fear of Death, or because they were not free of themselves; for they are obliged to keep their Oaths notwithstanding any Danger of Death or Forfeiture. (*Rot. Parl.* 1 *Hen.* 4. 97.)' From whence it is plain, that this had been the common Argument made use of by the great Men in Defence of their Illegal and Disloyal Practices; and Custom had so far prevail'd that

p. 89. hitherto it had the good Fortune to be thought just and reasonable; I may add, that it continued in the same Credit in the following Reigns, notwithstanding

withstanding this Petition of the Commons: For as *Henry IV.* in his Answer to it, says nothing, which implies a Disapprobation of that customary Excuse; so we find, that in *Henry V's* Time, those that had assisted Sir *John Oldcastle* only out of Fear of Death, were discharged: And lastly, by this Plea, *John Nevill*, Marquis of *Montacute*, procured his Pardon from *Henry VI.* at his Restoration, for being in the Service of *Edward IV.*; for it is said, he came to his Parliament excusing himself, that for Fear of Death he had taken King *Edward's* Part; which Excuse was accepted. Agreeably therefore with the allowed and approved Maxims of those Times, the Submission and Oath of the *Percys* to *Henry IV.* has a fair Pretence to a favourable Construction; since it was done purely to save their Lives and Fortunes, which otherwise must have been in imminent Danger. And this I would not be thought to mention, out of any great Reverence or Esteem I have for such an Apology; but only to shew, that those Gentlemen did not act dishonourably, according to the Sentiments of the Times they liv'd in, when they took an Oath to *Henry IV.* which at that very Instant, they believed they ought not to keep. This was the common Error of that Age, into which, the very Sages of the Law themselves had fallen; and therefore it is not to be wonder'd at; if Noblemen (who rarely meet with Casuists, that advise them against their Interest) have not more Wisdom or Honesty, than they that make those Vertues more particularly their Profession. Had they liv'd in these Days of Light and Knowledge, I confess, I should have found it difficult, to say any thing in their Defence; for the Doctrines of Christianity are now so well understood, that whoever should venture to maintain the Lawfulness of doing Evil for the Advancement of any Temporal End or Purpose, would draw upon himself at least the Displeasure of all good Men, and hardly escape a publick Censure. It may perhaps give Offence to the Doctor, that I have charged *Henry IV.* with a Breach of his *Original Contract*; and admitted that as a good Reason for the *Percys* taking up Arms against him: But if there is any ground for the Notion of a Con- p. 90.
tract between a Prince and his Subjects; it must be, when an Elected King is on the Throne, who owes that high Dignity entirely to the Choice of the Nobility, and the Consent of the People; and such a one, and no better, was this King *Henry*, whatever may be alledged to the contrary. He could not certainly pretend to a
juster

juster Title, than his Predecessor King *Stephen*; who yet consented to an Instrument of Government, in which he expressly calls himself an Elected King; and therefore the Historians tell us, that *Robert* Earl of *Gloucester*, and the Bishops too, did Homage to him conditionally, that he would maintain them in their Rights and Privileges; and we know very well, that his Violation of them was pretended as a Reason for their Revolt from him afterwards. Since therefore the Assistance given to *Henry* IV. by the *Percys* (by Virtue of which he was enabled to seize the Crown) was purely the Effect of that Confidence they reposed in his Promise and Oath, that he would never dethrone King *Richard*, nor put him to Death; I would submit it to the Doctor's Consideration, whether a Trust so notoriously broken and abused, did not authorize those Gentlemen to seek for Justice by Arms and Violence against him? That *Henry* IV. heaped great Honours upon the Earl of *Northumberland*, giving him the *Isle of Man*, and constituting him Constable of *England*, I readily own; and this he certainly did, that he might the better secure that Great Family to his Interest: But then I think this is a Proof, that they were not influenced by any Motives of Advantage to themselves by their subsequent Revolt, (as the Doctor calls it) for how prosperous soever the Event had been, they *could not well have promised themselves* greater Honours and Fortunes than they either actually enjoyed, or might reasonably have hoped for from the Bounty and Favour of King *Henry*. Thus I have clearly proved, that the Insurrections against *Henry* IV. were occasioned by a Profession of Fidelity to the Rightful Title; to *Richard* II. whilst alive, and the Earl of *March* after that King's Decease; and therefore the Authors and Promoters of them are much wrong'd by the Doctor, when he says, they acted upon quite different Motives.

The next Commotions that happen'd in this Reign, were those of Archbishop *Scrop*, and the Earl of *Northumberland*; and that these were raised upon the same Grounds, their publick Declarations sufficiently testify. The Archbishop's Articles are extant; in the Preamble of which he says, in his own Name, and that of all his Adherents, *That having been bound by their Oaths to King Richard II. to bear Faith and true Allegiance to him, as long as he lived, and his Heirs succeeding him by just Title, &c.* They therefore, for fear of Perjury, perceiving divers Crimes and Enormities to be daily committed against the Church,

the

the Laws of the Realm, as also against the Person of King *Richard*, and his Heirs; do, *First*, declare the Lord *Henry* of *Derby* to be a Traitor to King *Richard* and his Heirs. *Secondly*, They pronounce him Perjur'd and Excommunicate, for taking Arms against King *Richard*, and afterwards murdering him. In the *Tenth* Article they affirm, that they take up Arms for the sake of the Right Heir. Besides *J. Harding* tells us, That the Lord *Percy's* Articles were drawn up by this Archbishop; and another Author, (*Clement Maydstone in Mr. Wharton's Anglia Sacra, Vol. 2.*) that liv'd at the same Time, says, That the Reasons, for which that Archbishop was beheaded, were, *First*, Because he advised *Henry IV.* to repent of his Perjury in swearing by the Sacrament of *CHRIST's* Body, That he would not rebel against *Richard II.* nor consent to his Deposition; which afterwards he did. And, *Secondly*, The said Archbishop desired the Crown might be restored to the Right Line. 'Is it not then evident, that this Archbishop took up Arms for the Right Heir; and by his publick Declarations own'd to the World, that he thought himself bound in Honour and Conscience so to do? And may we not then believe, that He and the *Percys* were true Penitents, for having contributed to

p. 92.

the Settlement of *Henry IV.* upon the Throne?

It is a great Comfort to the Doctor however, that all these Lords and Gentlemen, who took up Arms against *Henry IV.* had before submitted to him, and sworn Allegiance; for he is only concerned to know, whether it has not been always the Custom, to swear to Kings *de Facto*: But if it has been the Custom to take such Oaths, he should remember, *That it has been also the Custom to break them*; which the Doctor knows to have happened in the Reigns of King *Stephen*, and *Henry IV.* the Two most undoubted Kings *de Facto* from the *Norman Conquest*; and thus we are reduced at length to this Question, *Whether the Doctor, or the chief Leaders in all the Insurrections against Henry IV. are rather to be credited?* If we must believe the Doctor, their Revolt was inexcusable, founded upon no rational Principles, and indeed was no better than downright Perjury and Rebellion: But if we may take the dying Word of those Gentlemen; they were persuaded, that the Oath they had taken to *Henry IV.* did not bind them; and that they were obliged in Conscience to force him from the Throne, for the sake of the Right Heir. Now the Doctor may call these unjust Pretensions, as

p. 93:

long as he pleases; provided he will but allow, that

it is true in Fact, that they made use of such, and no other; which he will never be able to disprove. And then I think I may appeal to the most byas'd Friend to the Doctor's Cause, Whether so many Gentlemen of the first Quality and Fortune in *England*, could openly and avowedly have ventured their Lives for a Person out of Possession; had it been then a known and undoubted Part of the Constitution, that whoever was in *Possession of the Crown*, was a *Rightful and Lawful King*. Had this been the received Doctrine of those times, it is wonderful strange, we should meet with no manner of Notice of it in any of our Histories; I would now only beg Leave of my Reader, to set before him a short View of the Comforts and Blessings, which attended the Doctor's *Constitution*, in this Reign of a King *de Facto*. Henry IV. had no sooner taken Possession of the Kingdom, but he was in Danger of losing it by a formidable Conspiracy; It is true, he had the good Fortune speedily to suppress it, and make an Example of its Authors and Contrivers: But fresh Troubles and Rebellions still followed one another for many Years of his Reign; and that evil Spirit of *Resistance* continued to animate the *Welsh* against him, to the last Period of his Life. Mr. Fox tells us, *The Time of his Reign was far from being quiet, but full of Trouble, of Blood, and Misery.* (*Acts and Mon.* Vol. I. p. 590.) Such was their Desire of King *Richard* again, in the Reign of this King, that many Years after, he was rumour'd to be alive; for which divers were executed. For the Space of Six or Seven Years together, almost no

Year passed, without some Conspiracy against the King, &c. And *Holinshead* confesses, he resign'd in great Perplexity, and little Pleasure.

These certainly are admirable Proofs of the great Submission and Obedience, which was then paid to the Doctor's *Constitution*; and no doubt, the Tranquility of this King's Reign will never be denied for the future, to be a lively Instance of the Authority of a King *de Facto*. The Author concludes these Remarks upon Henry IV's Reign, with the following Reflexion of Sir *Walter Raleigh*. (*In his Preface before his History of the World.*) Henry IV. whose Title was weak, and his obtaining the Crown traiterous; who brake Faith with the Lords at his Landing, protesting to intend only the Recovery of his proper Inheritance; brake Faith with *Richard* himself; and with all the Kingdom in Parliament; to whom he swore, that the Deposed King should live: After he had enjoyed this Realm some few Years; and in that Time had been set upon on all Sides by his Subjects, and never free

from

from Conspiracies and Rebellions; he saw (if Souls immortal see, and discern any Thing after the Body's Death) his Grandchild Hen. VI. and his Son the Prince, suddenly, and without any Mercy, murder'd: The Possession of the Crown (for which he had caused so much Blood to be poured out) transferr'd from his Race, and by the Issues of his Enemies worn and enjoy'd: Enemies, whom by his own Practice he supposed, that he had left no less powerless than the Succession of the Kingdom questionless, by entailing the same on his own Issues by Parliament. And out of Doubt, humane Reason could have judged no otherwise, but that these cautious Provisions of the Father, seconded by the Valour and signal Victories of his Son Henry V. had buried the Hopes of every Competitor under the Despair of all Re-conquest and Recovery. I say, that humane Reason might so have judged, were not this Passage of Casaubon also true; A Day, an Hour, a Moment is enough to overturn the Things, that seem to have been founded and rooted in Adament.

I proceed (says the Author) now to Henry V's Reign, to whom, the Doctor is positive, the whole Kingdom, submitted: The Earl of March himself quietly resigning up his Right to the Crown, without making the least Attempt for the Recovery of it. But the Doctor should have known, that the Welsh were not brought under this King's Obedience in the Third Year of his Reign; whose original Quarrel against him was upon the account of his Title, as I have shewn at large. And we are sure likewise, that the Earl of March was engaged in a Conspiracy in this Reign, in order to Depose King Henry, and set the Crown upon his own Head: That for this Purpose he had agreed with his Brother-in-Law the Earl of Cambridge, to go with him into Wales; where they intended to proclaim Harry of Lancastre Usurper of England. And the Earl of Cambridge declares, that the Earl of March had told him, that all his Confessors put him in Penance to claim that, they called his Right. Besides, we find this said Earl pardoned by Henry V, for the Share he had in this Conspiracy; which proves, the Doctor has strain'd a Point in History, when he would persuade us, that Earl never laid any Claim to the Crown. Afterwards, 'tis true, he gave Henry V, all imaginable Assurances of his entire Submission; upon which he was immediately employed by that Prince in the highest Offices of Trust and Honour; and those he discharged with great Fidelity, to the Time of his Death; which happen'd in the Third Year of Henry VI. During that Space of Time, after the Earl of March had

made this Submission, I agree with the Doctor, *Henry V's* Title had some Foundation: For to whomsoever the Rightful Heir shall think fit to swear Allegiance, and perform the Services of a dutiful Subject, I shall make no Question, but every private and inferior Person may very lawfully do the same. And this I take likewise to have been the Case of the People of *England*, for almost the whole Reign of *Henry VI.* For the Duke of *York* (who had the best Pretension by Blood to the Crown) having bound himself by repeated Oaths and Obligations, to pay Obedience to him, as his Lawful Prince; Who could reasonably be a *Nonjuror*, after such an Example? In this respect therefore the Doctor must do me the Justice to acknowledge, I yield him up a Point, which he seems to have very much at Heart. I allow it to be true, that *Richard* Duke of *York*, and his Son (afterward King *Edward IV.*) were under the strictest Ties and Engagements of Fidelity to *Henry VI.*; these are Matters of

Fact too evident to be contested; But then the
 p. 96. Doctor must confess, that *Henry V.* and *VI.* were Kings *de Jure*, as well as *de Facto*; i. e. they had a Right to the Subject's Allegiance by a different Title, than that of Possession; and consequently they are not Kings for the Doctor's Purpose; for the Question is not, whether Princes do not become Lawful by the Cession of the Legal Heir; this is granted, and allowed by his Adversaries; but whether the bare Possession of the Crown, exclusively of all other Considerations, can convey a Right to Allegiance? Thus we see the Doctor has given up Two of his Kings *de Facto*, which at other Times he seems to be very fond of, as main Supporters of his Imaginary Constitution. But whatever the Doctor may lose in this Point, he doubts not to gain in another; for from hence he thinks it plain and undeniable, that *Edward IV.* and his Parliament were to blame in calling *Henry V.* and *VI.* Kings indeed, and not of Right; as if this was the first time this Distinction had been ever used; whereas the Judgment given by the House of Peers in the Appeal of *Richard* Duke of *York*, was manifestly grounded upon it: For certainly they would never declare the Right of the latter to be indefeasible, had they believed *Henry VI.* to be King *de Jure*. But how could they think it reasonable, the Doctor will say, to give such a Sentence; considering the House of *York* had freely parted with their Right, by several solemn Oaths and Engagements? Could they not renounce their Pretensions to the Crown, if they had pleased? and was not this effectually done by their swearing Allegiance so often to *Henry VI.*?

I answer; The House of Peers, to whose Arbitration this Matter was referred, was of another Mind; for after a full Hearing of all the Objections, that could be made against the Duke of York's Title, (among which his repeated Oaths of Homage and Fealty had been carefully and warmly urged) it was concluded and agreed by all the Lords, *That the Title of the said Duke of York could not be defeated.* It is evident therefore, in the Opinion of that supreme Court of Judicature, That the Duke of York was still at liberty (notwithstanding the Oaths he had taken) to lay Claim to the Crown; and they thought themselves bound in Justice to adjudge it to him. During the Time that the Duke of York, who had the Hereditary Right, kept his Oath, and paid Allegiance himself to King Henry, I see no Reason, why the Subjects might not Lawfully swear and perform Allegiance also. But when the said Duke claim'd the Crown as his Right of Inheritance; then it began to be a Question, Whether the Subjects were bound to pay Allegiance to the *Lawful Heir*, or to the *King in Possession*, to whom they had hitherto paid it. The first Article objected against the Doctor's Claim was, That the Lords should call to remembrance the Oaths they had made to King Henry; to which the Sum of the Duke's Answer was, *That no Oath ought to be performed, when it leadeth to the Suppression of Truth and Justice;* and he undertook to shew clearly, before any Judge spiritual, *That the Lords were bound to assist him in Truth and Justice, notwithstanding any Oath of Feauté or other by him or them before made.* (Rot. Parl. 39 Hen. 6. n. 14.) The Oaths of the Lords made to King Henry might be excusable, by their Ignorance of the Facts necessary to clear the Right of the Lawful Heir; by his not Claiming; and by his swearing Fealty to the King in Possession: But when the Claim was made publickly, and the Duke's Right to the Crown was evidently prov'd before the Lords; then it was plain, that their Oaths to King Henry being against evident Right, could not have any Obligation; for it was a known Rule in the spiritual Law, That an *Oath was not instituted to be a Bond of Iniquity*: And in that very Age these Rules were inserted in the *Decretals*, (Decretal. Greg. 9. lib. 2. tit. 24. c. 19, 22.) That an Oath, taken in prejudice of a superior Right, was not valid; and that an Oath due to one, but made to another, was unlawful; and was to be performed to him, to whom it was due. Thus by the Canon Law the Oaths of the Lords were obligatory. And as to the Duke's Oath of Fealty to King Henry, according to the same Canon

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non Law, then universally Receiv'd, and the common Opinion of Divines, He might be releas'd from it, if it was taken by him to preserve his Estate, Liberty, and Life. 'Tis in vain to make a Dispute about Force, or Duress. 'Tis Notorious from the State of that Time, that if the

Duke had claim'd the Crown, or borne the Royal Arms, or refus'd to swear Fealty to King Henry, he had expos'd himself and Family to inevitable Destruction: To that Objection he answereth thus himself before the Lords; *That he abstained for the Time from pursuing of his Right and Title, for Causes not unknown to all this Realm*: The Danger of doing it was notorious to all Men, Wherefore as his Silence was no Cession of his Right; because there was a sufficient Cause of Silence: So his Oath of Fealty was no indispensable Renunciation of it, according to the received Law and Doctrine of those Times; because it was extorted by unjust Terror, and made by him *pro vitâ & rebus servandis*. King Henry could acquire no Right by exacting it, because his Requiring of it was Injustice and Usurpation: And as to the Duke, tho' he ought not to have taken it, to gain or save the World; yet when it was taken, the *spiritual Law* reliev'd him: And the Pope actually granted him a *Dispensation*, which was then thought a sufficient Absolution. I am far from allowing the Pope any Power of dispensing with Oaths, or justifying the easy Relaxation of them by corrupt Casuistry: But if we will judge of the Actions of Princes in Ages past, and examine the Validity of them, we must consider the Laws, Usages, and Doctrines then Receiv'd, and judge accordingly. Mankind in all Ages hath had an Horror of Violence, and Usurpation, as destructive of Society; and hath agreed to render the Effects of them null and invalid. Not Princes only, but all other sorts of Men, have always thought themselves free from the Obligations of Promises and Oaths, attended with enormous *Losses*, and extorted by Fear of losing Estate, Liberty, and Life; and great Writers upon the Law of Nature (*Puffend. de Jur. Nat. lib. 4. c. 2. s. 8.*) do plainly affirm the Nullity of such Oaths. In short. if the Duke of York's Oath had

then been try'd in any spiritual Court, as he desired it might be; he would no doubt have been acquitted of it. The high Court of Lords Spiritual and Temporal, his and their own Oaths notwithstanding, adjudg'd that his Title could not be defeated; and this was the general Opinion of the Nation in those Times, that the House of York had an indubitable Right; their

Oaths

Oaths to the House of *Lancaster* notwithstanding. If after all, the Doctor will persist to affirm, that *Richard Duke of York* and his Son were indispensably obliged by their Oaths to *Henry VI*, and could not possibly be discharged from them by any Authority in the Kingdom or out: This may be true, and yet the Award of the Peers be consistent with the Rules of Justice and Equity; for they do not pretend to determine, *what was fit for those Princes to do in Conscience; but what they were bound to by the Laws of their Country, of which they were the proper Judges;* and therefore whoever arraigns their Proceedings in this respect, does in Effect set up his own Private Judgment, against the Publick Sense of the Nation; *which in Modesty should be allowed to understand, what the Constitution was in their own Times, better than we can at this Distance; and in Charity we ought to believe, that they acted agreeably to it.* (View p. 7.) This I take to be the true State of the Case. The Duke might have still continued a Subject, had he thought fit; and would his Ambition have suffer'd him to be so contented in that Condition: But how could the Peers help it, if the Duke of *York* would not be satisfied without his Right? All that became them, was to consider impartially the Matter referred to them: And since at length they came to this Resolution, that he was still at Liberty to claim the Kingdom, and ought to be put in Possession of it; who will presume to say, it was Arbitrary and Illegal? If a private Subject swears to one, who has wrongfully disseized him of his Estate, that he will never attempt the Recovery of it; the Law will put him in Possession, if he applies to it, notwithstanding his Oath, which Religion *perhaps*, would oblige him to perform. And thus it is in many other Cases. If a Man loses a Sum of *Money at Play*, beyond what the Act of Parliament allows; and obliges himself by Oath to pay it; this may be a just Debt in Conscience; tho' the Law will not p. 100. force him to discharge it. In which Instance the Law does not pretend to annul his Oath; but only withdraws its assistance from the Party, to whom it was made, as unworthy of Countenance. And if the Law takes so much care of the Rights of Private Persons, that they have not Power to alienate their Properties, by any Oaths or Conveyances, contrary to customary Methods, and prescribed Forms; certainly we are bound to believe, that the *Titles of Princes and Heirs to the Crown, are at least as strongly guarded against any Injuries, which may be done them, even with their own Consent.* So that the Judgment of the House of
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Lords in this Case seems plainly to rest upon this Bottom; That the Oaths taken by *Richard Duke of York*, did not amount to a Resignation; neither could that be Legally and Validly performed, without a due Observation of the Form and Manner, requisite to be observed upon such an Occasion. It may now (continues *the Author*) be demanded, how it is then possible for a Right Heir to the Crown to resign his Title, if the Oaths and Submissions of *Richard Duke of York*, were not sufficient for that Purpose. I answer, That a Legal and Effectual Resignation can only be made before, and with the Concurrence of the Three Estates of the Realm; which evidently appears from the Proceedings in this very Case of *Richard Duke of York*. For tho' the Lords would not allow, what he had done, to be of Force to invalidate his Title; they were sensible it was then in his Power to do it effectually, in the Presence, and with the Approbation of both Houses of Parliament. And therefore, tho' they had declared his Title could not be defeated, yet they thought it adviseable for the Peace of the Kingdom, that he should consent, that *Henry VI.* should remain in the Throne for his Life; which being agreed to, and publickly ratified in open Parliament: Then, and then only, could *Richard Duke of York* be said to have made a sufficient and complete Resignation. And lest it should be suspected I have here deliver'd a singular Opinion destitute of all manner of Authority; I hope the following Passage out of my Lord Chief Justice *Hale's MS. History of the Pleas of the Crown* (Vol. I. cap. 9.) will

p. 101. acquit me in this Point, *A King (says he) that by Consent of Parliament takes another in Consortium Imperii, remains a King within the 25th of Edward III. We never had any Instance thereof in this Kingdom, but in that of Henry II, who took his Son into a kind of subordinate Regality; so that there was Rex Pater, and Rex Filius. But it is to be observed, that Henry II. did not divest himself of the Sovereignty, as some have thought; but reserv'd to himself the Liege, Homage, and Allegiance of his Subjects, yea and of his Son also: And although his Son were a King, yet he was a King but subordinate to his Father; and therefore, although he might be in some respects a King, in relation to the Subjects, that their Conspiring his Death might be Treason; yet he was but a Subject in respect to his Father; and his Attempt to eject his Father from his Kingdom, was Treason. But this Communication of Sovereignty by the King, could not be done without Consent of Parliament: For as a King cannot wholly resign or dismis himself of his Kingly Office, without Consent of Parliament;*

Parliament; so neither could be, without such Consent, divide the Sovereignty. It was a wise Expression of Queen Elizabeth, when she was urged to marry; she reply'd She was married to her Kingdom; there is a sacred Bond between the King and his Kingdom, that cannot be dissolved without the free and mutual Consent of both in Parliament. In foreign Kingdoms there have been Instances of voluntary Cessions or Resignations, which possibly may be warranted by their several Constitutions; but by the Laws of England the King cannot resign his Sovereignty, without his free Consent, and the Consent of Parliament. The Resignations that were made by Edward II, and Richard II, were extorted by Force, Violence, and Oppression, to give a Countenance to those Usurpations, that succeeded them; and were Acts of high Disloyalty and Injustice, and not to be mention'd without Detestation.

It must be confessed, that my Lord Chief Justice speaks only of the Resignation of a King, not of the Right Heir, who is not in Possession; but surely the People of England have an Interest in the Right Heir, as well as in the King; and have been sworn to one, as well as the other; and therefore it behoves them to be well assured, that Resignations made by such Heirs, are entirely free p. 102. and voluntary; which cannot be done to general Satisfaction, but in open Parliament. Besides, if Oaths should be allowed as sufficient to convey a Right to whom they are taken; it could not be doubted, but Kings might part with their Crowns out of Parliament, as well as the Doctor believes the Duke of York did with his *Hereditary Title*. So that all things duly consider'd, I may venture to say, That no Kingdom of the World has declared itself more clearly and expressly in Favour of the *Rightful Heir out of Possession*, and consequently against the Authority of a King *de Facto*, than our own has done in the particular Case now before us: For here we find Judgment given against a Family, that had been in Possession of the Throne near Sixty Years; that had been frequently and solemnly owned and recognized by the Submissions and Oaths of all the great Nobility, and even of those very Persons, who afterwards laid Claim to the Crown: From whence the Inference is very plain and obvious; that by the Constitution of England, the *Rightful Heir cannot destroy his Title by any Oaths of Homage or Allegiance*; but he is still at Liberty to revive his Claim, when he thinks convenient; which can never be entirely extinguished, but by his free and express Renunciation in open Parliament. The Doctor says indeed, that this was a partial Declaration of the House of Lords; King Henry being then a Prisoner, and the

the Duke of *York*, by a *late Victory, absolute Master of the Parliament*. But our present Dispute is about the Validity and Obligation of this Judgment; not the Means, by which it was obtain'd; which might be unrighteous and unjustifiable, and yet the Acts effected by them, of good Authority; for otherwise *Magna Charta* itself must be rejected, as Null and Void; since it was most certainly extorted by Arms and Violence. It is enough to our Purpose, That this Judgment was given in a full House of Peers; That King *Henry's* Friends were not only at Liberty, but were earnestly desired by the Chancellor to object every thing, that might be proper for the Fortifying of his Title; That this Judgment was the Foundation of the Agreement between *Henry VI.* and *Richard Duke of York*, which was assented to by both Houses, and confirmed by p. 103. King *Henry* himself. And lastly, it ought to be considered, that this Judgment was never reversed or censured as Unjust or Illegal; but has always been esteemed as a Rule for future Proceedings. if the like Case should ever happen. Some of our Chronicles, (*Halls Chron. and Holinshed from him.*) it is true, give us such a History of the Duke of *York's* Behaviour in this Parliament, that one would really think, that King *Henry* was a Prisoner, during the whole Session; or never appeared, or had any thing to do in it: for they tell us, that the Duke of *York* placed himself in the Royal Throne, at the Opening of the Parliament; and made a long Speech to the Peers, with all the Air and Authority of a King; but surely the Records are more safely to be rely'd upon, which represent Matters quite otherwise. There we find, that the Parliament began their Session in King *Henry's* Presence, who was seated in his Throne, in the Painted Chamber of his Palace at *Westminster*. And some Days after, the Claim of the Duke of *York* was presented to the Lord Chancellor, not by the Duke himself, but by his Counsel; who also returned an Answer to the Arguments urged in Favour of *Henry's* Title. All that I shall now add, is only this; That by Virtue of this Judgment, *Edward Earl of March* claimed the Crown, upon the Duke of *York's* Decease; and soon after obtained Possession of it; and then his Father's Words were remarkably verified: *That though Right for a Time may rest, and be put to silence; yet it rotteth not, nor shall not perish.* (Rot. Parl. 39. Hen. VI. N. 16.

I have now finished my Examination of the Doctor's List of Kings *de Facto*, from the Conquest to *Richard III.* and I persuade my self, have made it at least doubtful, whether
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most of them had not a better Title, than he is willing we should believe: However, I think I have proved, that the Obedience, which was paid to them, could not be the Effect of the Doctor's Principles. Surely, if there ever was Occasion for them, it was in this Case of King *Henry VI*, when his Friends were earnestly desired by him, to think of every thing, that might be proper to defend his Right p. 104. against the Claim of *Richard Duke of York*: But

among the Arguments urged for his Defence, it is evident, the Doctor's weighty Reasons were either never thought of, or else were over-ruled; which could never easily have happen'd, had they then been looked upon as any Part of our Constitution, or even as consistent with it. I must intreat the Reader to observe, that among the Reasons assigned for paying Obedience to the Doctor's Kings *de Facto*, I have not mentioned the Interposition of the Pope's Authority; which, as mean as he is pleased to think it then was, never failed to be employed in all publick Controversies in those Times; and was not a little consider'd. It were easy to prove this by many Instances; but at present I shall only desire the Doctor to remember, that those Princes, whom he has inserted into his List of Kings *de Facto*, took care in the first place, to fortify their Title by the Pope's Consent and Approbation; which could never have deserv'd the Pains they usually employed in procuring it; if it had not been of some Advantage to them, in the Opinion of their Subjects. *William the Conqueror* brought with him into *England* a Banner, that had receiv'd the Pope's Blessing; and he as well as his Sons, who succeeded him, as resolutely as they oppos'd the Papal Encroachments in several respects, were always desirous to maintain a good Correspondence with the Holy See. King *Stephen* made it a Part of his Title, that he was confirmed by the Pope in his Kingdom; The whole Body of the Bishops swore Fealty to *Stephen* a second Time, in Obedience to the See of *Rome*; and not long after absolutely refused to crown *Eustachius*, *Stephen's* Son, purely by Virtue of an Order they had receiv'd from the Pope. What Regard was paid to the Pope's Authority in King *John's* Reign, the Dr. seems to be sensible:

I beg leave to put him in mind, that the French Author, who wrote in Verse *An Account of the Troubles of Richard II.* of which he himself was a Witness, (MS. Bibl. HARLEY, 68. c. 23. fol.) says, *Archbishop Arundell procured a Bull from the Pope, which he openly read to People, in which the Pope offered a Plenary Indulgence to all, that should assist the Duke of Lancashire against Richard*

chard II. The Three *Henrys* of the House of *Lancastre* thought it no small Advantage to their Cause, that they had gain'd the *Popes* for their Friends. At last, indeed, his Holiness, by a strange piece of Ingratitude, is said so far to have abandon'd King *Henry VI.* as to have absolv'd *Richard Duke of York*, from all his Oaths to him; a Circumstance very worthy of the Doctor's Notice; because he expects from his Adversaries, that they should prove, the *Popes* had ever put in Practice their pretended Power of absolving Subjects from their Allegiance. Lastly, The Devotion of *Henry VII.* to the See of *Rome*, and how much he depended upon the *Pope's* Confirmation of his Title, are Matters of Fact sufficiently known. In the Beginning of his Reign a Bull is dispatched into *England*, in order to secure him on the Throne; which he thought of such Consequence, that the Archbishop of *Canterbury* was obliged to send his Mandates to all the Bishops, to enter the Contents of it in their Registers. In the 13th Year of his Reign this Bull was renewed; and a fresh Confirmation of his Title granted by *Pope Alexander VI.* under Pain of Excommunication to such, as should, create Troubles to his Government. And therefore all our Historians have taken care to assure us, that *Henry VII.* put a great deal of Confidence in these Bulls. The Truth is, none of our Princes have been so kind to *Popes*, as those that have had the weakest Titles; because they found it their Interest to purchase the Favour and Protection of the *Papal See* by large and unreasonable Grants and Concessions. Thus

King *Stephen*, to gratify the *Pope* for his Indulgence in confirming his Title, suffers his Legate to exercise a Degree of Authority in *England*, which was never before endured; and our Author tells us that Appeals to *Rome* first took their Rise from his Reign. *Henry IV.* being under the same Necessity of courting the *Pope's* Assistance, to support him in his unjust Possession of the Throne; was not wanting in his Compliments to him: Therefore in the Beginning of his Reign he procured himself a Power to moderate or repeal the Statute of *Provisors*; and the first Act of Parliament for burning of *Hereticks*, has been always thought to be the Effect of his Gratitude to the Holy See. Neither was *Henry VII.* less forward in dutiful Returns to his great Benefactor. And it must be confessed, upon all those Interruptions of the Succession, the Church of *Rome* so well found her Account, that she never failed to encourage them, as the properest Occasions of making her Encroachments on the Crown; and

and therefore in that respect, as well as in relation to the disadvantageous Bargains they were usually forced to make with Potent Peers, in order to engage them in their Interest: Mr. Prynne had reason to make this Reflexion, (in his Preface to Sir Rob. Cotton's Abridgment of the Records, Sect. 14.) *That Kings created and set up meerly by Parliaments, and their own Power in them, without any True Hereditary Title, have seldom answered the Lords and Commons Expectations in the Preservation of their just Laws and Liberties, and Answers to their Petitions.* As a Proof of which, I shall only take Notice of one particular Instance, among the many of this Nature, which the Reigns of *Henry IV.* and *VII.* furnish us with. Those that are acquainted with the Histories of those Princes, know very well, that *Henry IV.* had never any occasion to try his Fortune in Battle p. 107. against King *Richard II.*; and therefore could not with Justice pretend to owe his Crown to his Sword; but indeed to the general Disgust, which the Subjects of that unfortunate Prince had taken against him, which naturally produced a *Desertion*. However, he had the Confidence in open Parliament to pretend a Right to the *Isle of Man* by Conquest; and by Virtue thereof he gave it to the Earl of *Northumberland*. Whereas indeed the Conquest was no otherwise, than that *Sir William Scroop* was taken by him at *Bristow*, and beheaded by those, which were of the Part of this King, while he was Duke of *Lancastre*, and made his Way to the Crown. But it is not so much a Wonder, to see him give it as a Territory acquired by Conquest; if withal it be remember'd, that he had purposed to have challenged the Crowns of *England* and *Ireland* by a Title of the Sword, and not by Inheritance. But he was dissuaded from that Claim by *Sir William Thirning*, Chief Justice of the Common Pleas! and thence it was, that to give some Satisfaction to the Parliament, that doubted it, he made a publick Protestation, that he would not that any Man should think, that by way of Conquest he would disinherit any Man of his Heritage, Franchise, or other Rights, &c. I have represented this Matter in Mr. *Selden's* own Words, from whence it appear'd how safe the Liberties of *England* were like to be in his Hands after so early an Attempt against them. But *Henry VII.* had either more Resolution, or better Fortune; for tho' he ow'd his Success against King *Richard* to a Promise (*Bacon's Life of Hen. VII. pag. 2. Ed. Eng. Fol.*) he had made before he invaded the Kingdom, of marrying the Princess *Elizabeth*; yet he always made use of his Title by the Sword, and prefer'd it before all others: And the Truth is, it might be easily proved that he govern'd more like a

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Conqueror, than a Prince, that desired to be thought a Friend to the *Constitution*.

The Doctor having endeavoured to shew, that the Subjects always believ'd their *Allegiance* to be due to every Prince upon the Throne, without regard to Birth or any previous Title; in the next place he undertakes, to prove that Kings *de Jure* themselves have freely declar-

p. 108. red themselves of the same Opinion. Let us observe, from whence the Doctor draws this Discovery. He says, the *Year-Books* clearly shew, *that upon the Death or Demise of any King of England, (by whose Authority, and in whose Name the Laws are administred) all Actions, Suits, &c. which were depending in any of the King's Courts, were discontinued, and the Parties put off; so that the Plaintiffs were compelled to begin their Actions again, until the 1st of Edward VI. chap. 7. provided a Remedy. Thus it was after the Death of Edward IV. in the Courts of Edward V. Thus in the Courts of Edw. IV. after the Dispossession of Hen. VI; and so it was likewise after the Death of Richard III. in the first Year of Henry VII.* From which Instances the Doctor observes, *that Edward IV's, and Henry VII's Judges allowing, that all the Actions and Suits depending in the Reigns of Hen. VI. and Richard III. were discontinued by their Death or Demise, they likewise acknowledged thereby the Authority of those two Kings, by which, and in whose Name the Laws had been administred in their respective Reigns:* On which Argument the Doctor insists as much to his Purpose. But I think this a strange and very unaccountable Way of Reasoning. For how can it be any Proof of the Authority of a King *de Facto*, when alive; because it ceases, when he is dead? My Lord Chief Justice Coke has given a plain Reason, why *Discontinuance of Process and Law-Suits* was unavoidable in those Times, upon the *Death or Demise* of every King; and that is, because all their Commissions expire with themselves; and consequently the Courts of Judicature were destitute of

Judges to preside over them; and proper Officers were wanting, upon whom the Execution of all Writs and Orders depends: So that the Doctor's Argument is plainly this; *Henry VI. had as little Power in some Cases, as his Predecessors; therefore he had as much as they, in all other respects: Or thus; Henry VI. could not raise Taxes without a Parliament, no more than King Edward III; therefore he was as Lawful a Prince as he. Surely one must have great Partiality for the Doctor, to approve of such Reasoning. Had the Case in*

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deed been quite otherwise, upon *Henry VI's* Demise; had the Law-Courts been open, and Processess been continued; it might truly then have been affirmed, that his Commissions had a greater Force and Virtue, than any of those of his Predecessors; and this, might have been admitted as a Proof that *Edward IV.* did really own his Authority: But as the Doctor has managed his Argument, it is evidently to the Disadvantage of his Cause; for were it true, that he is a Lawful King, upon whose Death or Demise all Processess are discontinued in the Courts of Justice; then it would be impossible there should be any Usurpers; then *Oliver Cromwell* would have had a good Title, according to the old *English Constitution*; and lastly, the Authority of the *Commonwealth* must also be allowed; for all Processess, &c. begun in their Courts, would have been discontinued at the Restoration of King *Charles II.* if an Act of Parliament had not passed on purpose to prevent it. In a word, the Doctor infers from the *Discontinuance of Actions, Suits, &c.* in the Courts of Law, at the Demise of *Henry VI.* and the Dispossession of *Edward IV.*; that these two Kings mutually acknowledged one another's Authority. Now the Reader must needs think this a very strange Piece of News; if he considers, that these Princes treated one another, upon all Occasions, with the opprobrious Names of *Usurpers* and *unjust Possessors* of the Throne: The Doctor knows this to be true of *Edward IV.* whose Acts are full of Reflexions on the Three *Henrys*, as Kings without any Right or Justice; and when *Henry VI.* recovered the Crown, he speaks of *Edward IV.* in the same obliging manner; for he says, that he *falsly*, p. 110. *traiterously*, and *usurpingly* possessed the Crown.

The Doctor now proceeds to another Argument from the *Year-Books*. From them, says he, we may observe, that all the Grants, Licenses, Letters Patent, and in short, all the Regal Acts of the Three *Henrys* of the House of Lancaster, and of *Richard III.* are pleaded and allowed in all the Judicial Proceedings of *Edward IV.* and *Henry VII's* Courts of Judicature, to be as valid, as if they had been the Grants, &c. of any of their Progenitors of the most uncontested Titles. Bagot's Case is that, which has been usually urged and debated in this Controversy; and some may be apt to think, this is the only Instance, that is to be given; but in Truth the *Year-Books* furnish us with abundance of the like Cases. Bagot's Case alone was cited, I suppose, by my Lord Chief Justice Coke; not only because he thought that Case was of itself decisive; but because it was the only Case in the *Year-*

Books, where the Authority of a King *de Facto* had ever been disputed, and yet Judgment given for it; and because several Points of Law relating to that Authority were there maintain'd. In answer to all this, I might justly question, whether in Fact it be true, that such an abundance of Instances can be produced of Grants, Licenses, &c. of the Three Henrys, which were pleaded and allowed in the Courts of Edward IV. For after a careful Perusal of the Year-Books of that Reign, I must freely own, that if any such are to be met with, they have escaped my Observation. It is worth enquiring of the Doctor, within that Period of Time this abundance of Instances happen'd; for if they all preceded Bagot's Case, it is strange they did not prevent it; or that that Case should ever have troubled the Courts of Justice, had the Authority of Kings *de Facto* been held unquestionable. But after all, if some such Instance should be produced, I would intreat him to consider, whether those Grants of the Three Henrys, that should be found to be allowed in the Courts of Edward IV. did not

p. 111. owe their Validity entirely to the Confirmation of that King. For if this should prove to be the Case, I may then safely appeal to the most partial of his Friends, whether this Argument from the Grants, &c. of the Three Henrys, can do this Cause any Service. As for the Grants, &c. of Richard III. which the Doctor is pleas'd to affirm, were likewise admitted as valid in several Instances by Henry VII's Judges; I must think this another Mistake; because I have not been so fortunate, as to meet with any such in my Search: However I am persuas'd, they will not turn to his Account, should they ever appear. I am now arriv'd at that famous Case, which the Doctor calls *Decisive*; and believes to be an indisputable Proof, that the Law of England ascribes a full and complete Authority to Kings *de Facto*, by allowing all their Grants and Regal Acts to be valid and effectual to all Intents and Purposes. I shall therefore lay it before the Reader in a more exact and ample Manner, than I think has been hitherto done; some Circumstances having been omitted in former Representations of it, which are very fit to be observed, in order to make a right Judgment of it. The Case is this. (9 Edw. 4. 3 Term. Trin.)

King Edward IV. in consideration of the good Services done him by J. Bagot, grants by his Letters Patent (Anno 4 Edward. 4ti) to him and W. Swirendon, or to the Survivor of them, the Office of Clerk of the Crown in Chancery, after the Decease or Surrender, &c. of one

William

William Rous, then in Possession of it. *Anno 6to Edwidi 4ti William Rous*. surrenders this Office; and then the said *Swirendon* and *Bagot* immediately take Possession of it, by Virtue of the Letters Patent beforementioned; and continued in this Office, till one *Thomas Ives* dis- seized them of it, upon Pretence likewise of Letters Patent dated *Anno 6to Edwidi 4ti J. Bagot, &c.* upon this commence a Suit against *Thomas Ives*, in which the said *Ives* being Defendant, alledges against *Bagot*, that he was an Alien, born out of the Allegiance of the King of *England*, and under the Obedience of *Charles King of France*, the King's great Adversary and Enemy. *Bagot* upon this shews a Patent of p. 112. Naturalization, granted him by King *Henry VI.* in the 37th Year of his Reign: *Ives* replies, That all the Regal Acts of the Three *Henrys* being annulled by Act of Parliament, that Patent was consequently of no Authority. Some time after came on another Tryal between *Bagot* and *Ives*; and then the Act of Parliament alledged by the Defendant, to invalidate the Patent granted by *Henry VI.* was considered; and it was affirmed by *Bagot's* Counsel, That notwithstanding that Act, the Patent of Naturalization granted to *Bagot* was good; for King *Henry* was King in Possession; and it was requisite, that the Kingdom should have a King, under whom the Laws might be kept, and Justice administred: Therefore altho' he was King only by Usurpation; yet every Judicial Act done by him, which concerns the Royal Jurisdiction, shall be good, and shall bind the King *de Jure* at his Return; and then they instance in a Pardon of Felony, a License of Mortmain, a Grant of Ward, &c. And that therefore the King that now is, shall have Advantage of all Forfeitures made to *Henry VI.*; and for a Trespas committed in his Time, the Writ shall run, *contra Pacem Henrici 6ti nuper de Facto & non de Jure*; and a Man shall be arraign'd for Treason committed against the said King *Henry*, in compassing his Death: And therefore such Judicial Acts made by the said King *Henry* shall be good, provided they are not to the Diminution of his Crown; for then they shall be voided by the King that now is, in his ancient Right. Besides, this King *Henry* was not meerly an Usurper; for the Crown was entail'd upon him in Parliament. Then Judge *Biling* delivered his Opinion, That it belonged to every King, by reason of his Office, to do Justice, and shew Mercy; Justice in executing the Laws, and Mercy in granting Pardon to

' Felons, and such a Legitimation, as this of Bagot's &c. And
 ' lastly, it was said, That if he, who is now King, had
 ' granted a Charter of Pardon in the Time of Henry VI.
 ' it would have been now void; for every one, that shall
 ' grant a Charter of Pardon, ought to be King *in Fact*,
 ' And whereas it had been urged by the Defen-
 p. 113. ' dant, and his Counsel laid great Strefs upon it,
 ' That Bagot was an *Alien*, born in the Domini-
 ' ons of *France*, out of the King's Allegiance; this is
 ' utterly denied by Bagot, who says, That his Parents were
 ' both *English* by Birth; and that he was born the King's
 ' Subject in his Duchy of *Normandy*; and the same is like-
 ' wise affirmed in the *Letters Patent* of Henry VI. On the
 ' other hand, the *Serjeants* and *Apprentices*, who were of
 ' Counsel for *Ives*, would not allow these Letters Patent
 ' of Henry VI. to be good; For, say they, the King must
 ' not be in a worse Condition, than any common Person. If
 ' a common Person is disseized, and recovers Possession again,
 ' he shall defeat all the mean Acts; therefore the King shall
 ' do the same, now that he enjoys his Right, descended to him
 ' from King Richard. Besides, this Act (*viz.* the 1st of
 ' Edward IV. which voids the Acts of the Three Henrys)
 ' is nothing else, but an Affirmance of Common Law; there-
 ' fore by his Regress he has voided all Acts made by the Usur-
 ' per; and upon this Account it is, that in the said Act he has
 ' excepted all Judicial Acts, &c. and declared them good; but
 ' for the Validity of these Letters Patent, no Provision is made
 ' in it. And then as a farther Proof, that the Acts of a
 ' King *de Facto* are of no Authority, they add; That a
 ' League made between King Henry VI. and any other Foreign
 ' Prince, tho' intended for the Advantage of the Realm, shall
 ' not bind the King that now is. And at the last Hearing
 ' of this Cause, Judge Bryan opposed the giving Judgment
 ' for Bagot, for this Reason; because the King being now
 ' in his Remitter, as Cousin and Heir to King Richard, the
 ' Patent made by King Henry, who was only an Usurper and
 ' Intruder, was void. At length, after several Hearings,
 ' the Judges having debated the Matter, resolv'd, that no
 ' Objection had been offered of Weight enough to procure an
 ' Arrest of Judgment; and so Bagot was put in Possession of
 ' his Office." This being a true and full Representation
 of this celebrated Case; I shall, with some Confidence,
 refer it to the Reader, First, Whether the Doctor's Me-
 mory or Skill did not fail him, in some Parts of
 p. 114. the View he has given of it. Secondly, Whether
 the Inferences he draws from it are so evident
 and

and just, as he imagines. And, *Thirdly*, Whether in Truth any Propositions can be extracted from it, that will serve his Purpose. For, in the first Place, he tells us with no little Assurance, *That the opposite Counsel did not deny any one of the Points of Law maintained in Bagot's Plea*; and then with an Air peculiar to great Writers, asks the Question; *Wou'd not the Counsel on the other side have contradicted or answer'd, if they could, what had been urged in behalf of Bagot, as it concern'd their Client's Cause?* I confess, it is not without some Amazement, that I look upon these Passages in the Doctor's Book; and I now appeal to the Reader, whether there is not reason for it: Let him but cast his Eye upon what I have just now recited; and let him judge between us, whether the said Quotations do not contain a direct and full Answer made by *Ives's* Counsel to that of *Bagot*. Is it not plain from them, that the Plaintiff's Counsel denied what the Defendant's affirmed? *Bagot's* Lawyers are positive, that *Henry VI's* Letters Patent are good; because all Judicial Acts done by an Usurper shall be good, and bind the King *de Jure* at his Return. But *Ives's* Lawyers answer, that these Letters Patent shall be void; *because otherwise the King should be in a worse Condition, than a common Person, &c.* and therefore they add, That all Acts done by an Usurper are void; and that even the Judicial p. 115. Acts had not been good, but by Virtue of *Edward IV's* Confirmation; but then they deny, that these Letters Patent could come under the Denomination of Judicial Acts. Is not this a manifest Contradiction to the Plea of *Bagot's* Counsel; and a plain Denial of the Points of Law contain'd in it? And if it is so, I must be allowed to say, the Doctor has not fairly represented the Case. *Bagot's* Case, says the Doctor, *is the only one, where the Authority of a King de Facto had ever been disputed*; and yet even then not disputed at Common Law: For the Counsel against *Bagot* seem'd well enough aware, that the Authority of a King *de Facto* was good at Common Law, &c. Nothing surely can be more directly contrary to the express Words of *Ives's* Counsel, than this Assertion; for as they lie in the Year Books, they are these which follows. *That Act* (meaning the First of *Edward IV.* which annuls the Acts and Grants of the Three *Henrys*) *is only an Affirmance of the Common Law*; and therefore King *Edward*, at his Regress, voided all the Acts made by the Usurper, &c. Does it appear from hence, that they were aware, that the Authority of a King *de Facto* was good at Common Law, when they undeniably af-

firm, *that by Common Law all the Acts of Usurpers are to be declared void?* In the second Place I am to enquire, whether the Inferences he draws from this Case, are so evident and just, as he imagines. And in order to this, I desire it may be remember'd, that the Grand Position, which, the Doctor would persuade us, is demonstrable from the (*View*, p. 8. &c.) Proceedings now before us, is this; *That the Authority of a King de Facto was fully own'd and acknowledged in the Courts of Judicature of King Edward IV, a King de Jure.* And this (p. 50.) he is pleas'd to infer, *First*, From the Pleadings of Bagot's Counsel; and *Secondly*, From the Judgment, which was at length given for him. *First*, He infers from the Plea of Bagot's Counsel, that the Law allowed of the Authority of Kings *de Facto*. But might not that

p. 116. Counsel err in those Points, which they urged for Law? And were they exempted from the common Infirmities, which the ablest Lawyers have been subject to, of being sometimes mistaken? The Doctor indeed, as aware of this Objection, tells us, *The opposite Counsel would certainly have denied these Points of Law, if they were not evident.* But I have already shew'd, that the Doctor's Accuracy here fail'd him; nothing being more true, than that *the opposite Counsel did deny the Points of Law maintain'd in Bagot's Plea.* So that here we have Counsel against Counsel; and consequently Law against Law; and then the Question still remains, which Side was in the Right; and which it was the, Law did really favour; so that the Authority of Kings *de Facto* is not yet a decided Truth. The Doctor therefore seems to be sensible, that his Assertion needed a farther Support: and for that Reason asks, *Can any Man believe, that in the Courts of Edward IV, who had waded through so much Blood to the Throne, and was so jealous of any thing, that favoured the Lancastrian Kings, they durst have made this Plea, if they had not known it to be Law?* To this I answer; I see nothing in this Plea, which could give any just Offence to Edward IV, or his Party: For that Prince had only Cause to be jealous of those Opinions, that favoured the Right and Claim of the *Lancastrian Kings*; not of such, as only asserted the Reasonableness of allowing the *Judicial Acts* of the Three *Henrys*, and such other, as were necessary for the *Order of Government* in general, and were not prejudicial to his own Title; which, I doubt not, will appear to be the only Use, that can be fairly made of this Plea. But supposing the Case to be as the Doctor represents it; I cannot see the Necessity of his Consequence; for why may it not sometimes happen, that a Counsel

Counsel should use an undue Liberty in their Pleadings ; and that in a Point of Moment too, without any real Warrant from Law ; and yet meet with no Reprehension from the Judges ? Is Modesty inseparable from the Gentlemen only of that Profession ? Or is it impossible for Courts of Justice to be guilty of too much Lenity and Patience towards those, who would have their Boldness pass for Law ? I freely own, that if the Judges understood the Plea of *Bagor's* Counsel, in the Sense the Doctor does, and thought they were in the Wrong, they ought p. 117. to have resent'd their Presumption, and rebuked them for it ; but if they thought them in the Right, and believed they said nothing, but what was agreeable to the Laws ; why then did they suffer *Ives's* Council to argue with that Confidence, against so sacred a Thing as the Constitution ? Behold how audaciously they affirm to the Court, *That the King de Jure shall defeat all the mean Acts of the King de Facto, when he recovers his Right. That the first of Edward IV. (which voids the Grants of the Three Henrys) is nothing else but an Affirmance of Common Law, which gave him Authority to void all the Acts of the Usurper his Predecessor.* Were there ever more scandalous and insufferable Affronts offer'd to the Laws and Constitution of *England*, in the Doctor's Opinion ? And therefore surely the Serjeants and Apprentices, who ventured to utter them, ought to have felt the Weight of the Judges Indignation for such unparallel'd Boldness : But since it appears, they escap'd with Impunity, will the Doctor therefore give his Adversaries Leave to infer, that the Court allowed of their Plea ? And if his Argument thus returns upon him ; it will become him to be sensible, that it is not worth his while to insist upon it. Upon this Occasion it will not be impertinent to put him in mind of a Passage, which happen'd at the Tryal of *Algernon Sidney*. That Gentleman had been charg'd with Writing some treasonable Papers found in his Closet ; he denies indeed, that he wrote them ; but after the Reading them in Court, he had the Confidence to say, he did not know, why any body should be ashamed of being the Author of them. For (says he *Tryal of Algernon Sydney*, p. 32, 33.) *they seem to be an Answer to Filmer, who maintains this Principle, That 'tis the same thing, whether a King come in by Election, by Donation, by Inheritance, or Usurpation, or any other way ; than which I think never was a thing more desperately said. Cromwell, when one White a Priest wrote a Book, wherein he undertook to prove, That Possession was the only Right to Power ; though he was a Tyrant, and a violent* one,

one, though it so odious a Principle, that he would not endure it, and used him very slightly for it. Now this Filmer is the Man, that does assert it, that 'tis no matter, how they come by their Power; and gives the same Power to the worst

p. 118. Usurpers, as they, that most rightly come to the Crown. By the same Argument, if the errantest Rascal of Israel had killed Moses, David, &c. and seized upon the Power; he had been possessed of that Power, and been Father of the People. If this be Doctrine, my Lord, that is Just and Good, than I confess it may be dangerous for any thing to be found in a Man's House contrary to it, &c. Now the Use I would make of that Passage, is this; It is plain, it contains a Doctrine directly opposite to a very considerable Part of the English Constitution, if the Doctor is in the right: It is utterly inconsistent with those Notions, which he maintains are evidently supported by the Common and Statute Laws of his Country, and have been confirmed by the constant Example and Practice of the greatest Men, for above Six Hundred Years: And yet the Chief Justice, the Judges then upon the Bench, the Attorney and Solicitor-General, and the rest of the King's Learned Counsel permitted the Laws of the Nation to be arraigned in so publick a Manner, without the least Censure or Reproof. I would now ask the Doctor, if I might presume so far, Whether such an Omission in those that presided at that Tryal, could fairly be interpreted as a Concession, that what Mr. Sydney said was true?

Lastly, The Doctor concludes, from the Judgment given in Favour of Bagot, that the Court plainly declared for the Validity of the King de Facto's Patent; and consequently of his Royal Jurisdiction, though not confirmed by the King de Jure, in a Statute made expressly for that Purpose. These Words are home, I confess; and would be fully to the Doctor's Purpose, if they were true; but that I must beg Leave to doubt of, for the following Reasons; First, Because the Judgment for Bagot did not necessarily imply the Validity of the Patent of Henry VI. upon the certainty of which the Doctor entirely depends in his present Argument; for p. 119. he does not pretend to infer the Authority of a King de Facto from any other Medium, but that of the Validity of his Patent: But if that cannot be proved from this Judgment, we are then just where we were; and we must wait for happier Discoveries, before we admit of the Authority of Kings de Facto.

The Reader will be pleased to remember, that the Point aim'd at by Bagot in this Tryal, was to get Possession again of the Office, to which he laid Claim by the Grant of Edward

Edward IV; and that after several Hearings at length the Judges declare, *That nothing had been suggested of Weight enough to cause an Arrest of Judgment*; and then they proceed to give it for *Bagot*, viz. *That he shall recover his Office, &c.* Now I must here observe, that it does not appear, upon what Grounds and Reasons they gave this Judgment; the Doctor indeed is positive, that it was by Virtue of the Patent of *Henry VI.* which they allowed to be good: But how does he know that? Was there no other Motive suggested in *Bagot's* Plea, that could possibly induce them to determine for him? If there was; then the Doctor must confess his Cause is still doubtful. Now it is evident, that tho' *Bagot* did plead the *Patent of Naturalization of Henry VI.* to qualify him for this Office; yet he also affirmed, that he was *born of English Parents in the King's Dutchy of Normandy*; and consequently had a just Claim to the Rights and Privileges of an *English Subject*, tho' his Patent of Naturalization were let aside; for if this should not be allowed to be a Legal Title, we must at once reject all my Lord Chief Justice Coke's Arguments in *Calvin's Case*, and the several Judgments given for the *Post-Nati*, by the ablest Lawyers, in King *James I's* Reign; the Doctor ought not therefore to think it improbable, that the Court was influenced by this Reason, in the Judgment they gave for *Bagot*. But, *Secondly*, Supposing the Patent of *Henry VI.* were admitted to be *valid*, by Virtue of this Judgment; yet this would not be a sufficient Proof, that his Authority was allowed of in the Courts of *Edward IV*: For the Patent might derive its Force only from the Authority of *Edward IV*, who confirmed it; not from any that was acknowledg'd to be in *Henry VI.* And the Truth is, this is all that *Bagot's Counsel* pretended to; for it is plain they contend only for these Two Points: *First*, That all the *Judicial Acts* of *Henry VI.* should be allowed to be good. p. 120.

Secondly, That this *Patent of Naturalization* should be admitted to be a *Judicial Act*: Now the opposite Counsel very readily grant, that the *Judicial Acts* of *Henry VI.* were declared *Valid* by the first of *Edward IV*; but then they do not agree, that this *Patent* was of the Nature of a *Judicial Act*: So that if at last the Court was of Opinion, (which is not unlikely) that this *Patent* might very well come under the Denomination of a *Judicial Act*; it was then consequently confirmed by *Edward IV*; and ought to be look'd upon as sufficient for the Purpose, for which it was produced; but then this is only a Proof of the Authority of *Edward IV*, not of that of *Henry VI.* The Doctor possibly

sibly may be of the same Opinion with *Ives's* Counsel, and deny that this *Patent* was a *Judicial Act*; but then he differs from his old Friends, the Managers of *Bagot's* Plea, upon whose Judgment he has hitherto thought he might safely depend: And besides, it appears from another Case in the *Year Books*, that all *Acts of Record* enter'd in Chancery, may properly be term'd *Judicial Acts*; for the Chief Justice *Markham* having there questioned the Authority of *Coroners* chosen in the Time of *Henry VI*, *Yelverton* and *Choke* answer, *That the Election of a Coroner being certified in Chancery, is an Act of Record, and a Judicial Act*; in which Case, all *Judicial Acts* done in the Time of the last King, are affirmed by the King and all his Council. Which does not only furnish us with a fresh Confutation of what the Doctor had affirmed, viz. *That Bagot's Case was the only one, in which the Authority of a King de Facto had been ever disputed*; but also seems to be a clear Proof, that *Bagot's Patent of Naturalization* being an *Act of Record*, ought to be look'd upon as a *Judicial Act*. So that after a due and full Examination of this famous Case, which has so often been appealed to, and is insisted upon by the Doctor, as *decisive* in the

p. 121. present Controversy; we are still as much in the Dark as ever. It is not certain that the Judges thought *Henry VI's Patent* was valid; or if they did, it is not certain, but they might think so from the Confirmation of *Edward IV*, not from any Authority it deriv'd from *Henry VI*; and therefore it remains still to be proved, That the Courts of *Judicature* fully acknowledged the Authority of Kings *de Facto*. It may be expected, I should take a little more Notice of the *Points of Law* contain'd in the Plea of *Bagot's* Counsel: I shall therefore now endeavour to gratify him in this respect; and I doubt not but to make it appear, that these *Points of Law*, understood in his Sense, do certainly prove too much; but if we are to understand them according to their natural, obvious, and only true Meaning; they will then as manifestly prove too little. First, I say, these *Points of Law* prove too much; because the Authority of all Governments *de Facto* may as well be infer'd from them, as that of Kings *de Facto*: Which is more than the Doctor will be willing should follow from any of his Positions. For when his Adversaries had objected, that his Arguments had a plain Tendency to maintain the Legality of all the Publick *Acts* of the late Republick, and *Oliver Cromwell*; it is observable, with what Indignation he resents the Charge of such a Consequence; and reproaches them with the Guilt of that Absurdity, which they intended

ded to fasten upon him. But how great soever may be the Displeasure I must expect to incur by this Imputation; it is to me evident, that the Reasons made use of by *Bagot's* Counsel, will serve the Cause of a *Commonwealth*, as well as that of a *King de Facto*. First, It is said to be necessary, *the Realm should have a King, under whom the Laws should be kept and maintained*. Very good; but a *King* then is only necessary for the sake of Government: And may not that End be obtained under a *Commonwealth*? The Laws may be better executed perhaps by a *King*, than a *p. 122.* *Cromwell*, or a *Republick*; but if a *King* is not to be had, it is necessary to have some other Government; because otherwise the Laws could not be kept, nor maintained. To whatsoever Powers therefore we are beholden for that Benefit; they must have the same Authority, as a *King de Facto*. The Counsel proceed; *Therefore altho' he was in but by Usurpation; yet every Judicial Act done by him, concerning the Royal Jurisdiction, shall hold good, and shall bind the King de Jure, when he returns to the Crown, &c. Thus Charters of Pardon shall be good, &c.* Their Argument is still grounded upon the Principles of common Justice and Equity; and why may not these take place under a *Commonwealth*, as well as a *Monarchy*? They go on; *The King that now is, shall have the Advantage of all Forfeitures made to King Henry VI.* True; and so had *King Charles II.* the *Forfeitures* made to the *Commonwealth*: And therefore according to this Argument, the *Commonwealth* was a Legal Government. It follows; *And for a Trespass committed in Henry VI's Time, the Writ shall run contra pacem Henrici 6ti nuper de Facto & non de Jure.* Here, I am at a Loss how to proceed; for I am loath to believe, that for *Trespases* committed under the *Commonwealth* or *Oliver Cromwell*, the Writs should run (in the Reign of *King Charles II.*) *contra Pacem Reipublicæ*, or *contra Pacem Oliveri nuper Angliæ Protectoris, &c.* and yet, according to the Doctrine of *Bagot's* Counsel, and the Doctor's Principles, it seems to be unavoidable. For how could an Indictment for Crimes committed under the *Commonwealth* otherwise be formed? Surely it would not be proper to say, That *Trespases* committed under the late *Republick*, were *contra Pacem Caroli Regis*; for he being out of Possession, could not grant a *Pardon*. [View, p. 16.] He could afford his Subjects no *Protection*, and therefore no *Allegiance* was due to him. [View, p. 52. Def. p. 111.] But after all, I find my self mistaken; for it was Resolved by all the Judges, that the Indictment for the Murder of *King Charles I.* should conclude, *contra pacem nuper*

nuper Domini Regis, & dignit. suas, necnon contra pacem Domini Regis nunc, coron. & dignit. suas. And it was likewise declared by them, *That tho' King Charles II. was de Facto kept out of the Exercise of the Kingly Office by Traytors and Rebels; yet he was King both de Facto and de Jure.* [Kelings Reports, p. 11. 15.]
 p. 123. Now the Question is, Who were the better Lawyers, Bagot's Counsel, or these Judges? If the latter, then Henry VI. was not so much as King *de Facto*.

The next Point, (*Adds the Author*) seems to be peculiar to the Case of Henry VI. and not extensive enough to be applied to all Kings *de Facto*. It is this: *A Man shall be arraign'd for Treason against King Henry VI. in compassing his Death; because the said King was not meerly an Usurper, &c.* I say, this is a Privilege, which belongs only to such Kings, as are not meerly Usurpers; and therefore will not prove the Authority of Kings *de Facto* in general; which was the Doctor's proper Business. It is true, the Lord Chief Justice Hale (in his large *Pleas of the Crown*, not yet printed) is of Opinion, That Treasons committed against an Usurper, or Rex *de Facto* & non *de Jure*, shall be punished after the Regress and Obtention of the Crown by the Right Heir. But then he affirms this with such Limitations, as I fancy will not be very acceptable to the Doctor: His Words are these; *If there be a Treason committed against the Usurper, which refers not to the Competition of the True Heir, as counterfeiting the Coin or Seal of the Usurper, compassing his Death by Treachery, &c. these Treasons have been punished notwithstanding the Regress of the Right Heir, and in his Time* 9 Edw. 4. 1. 4 Edw. 4. 20. *For these are indeed Offences, that are rather against the Interest of Kingly Government, than the Interest of the Usurper. But if the Treasons be such Acts, as were done in the Right and Assistance of the Right Heir to the Crown; these are purged by the Regress and Obtention of the Crown by the Right Heir.* (Hale's MS. Hist. Plac. Coronæ, Vol. 1. c. 13.) Now I intreat the Reader to judge, whether the same thing may not be said, with relation to the same Offences committed under a Commonwealth? Are they not such, as are rather against the Interest of Government in general, and therefore deserve to be punished even by a King *de Jure* at his Restoration? To return to the Points of Law insisted upon by Bagot's Counsel; they add, *Any Gifts or Grants made by King Henry, which were not to the Diminution of the Crown, shall be made good.* If these Words are to be understood without any Restriction, they are not true; for Edward IV, did by Act of Parliament vacate

vacate several Grants of *Henry VI.* which were not to the *Diminution of the Crown*; and surely p. 124. the Counsel would not say, he could not do that lawfully, which he had actually done by Law. But if they mean no more, than that *many Gifts or Grants made by King Henry, which were not to the Diminution of the Crown, shall be made good*; this will admit of no Dispute: But then what Reason can be assign'd, why a Commonwealth should not have the Benefit of the like Plea? The last Particular, that was urged in this Case, was, *That if he that is now King, had in King Henry VI's Time granted a Charter of Pardon, it would be void now; for every one that shall grant a Charter of Pardon, must be King in Facto.* This may in some Sense be true, and yet be of no Advantage to the Cause of Kings *de Facto*: For if by *Henry VI's Time*, we are to understand the Time preceeding the 4th of March, when *Edward IV.* first took upon him the Name and Authority of a King; undoubtedly a Pardon then granted by the said *Edward*, could not be good; because he had not yet publish'd his Claim to the Crown; nor made use of the Regal Style. But the Reason subjoin'd plainly shews, the Counsel were of Opinion, That *no Pardon granted by a Prince out of Possession, could be valid.* Now I might question whether this was held to be Law at King *Charles II.'s Restoration*; for when some of the *Regicides*, at their Tryal, laid hold on the King's Declaration made at *Breda*, as a Grant of Pardon; they were told by the Chief Baron and Solicitor General, that it could only be a Pardon in Honour, not in Law; because it wanted the Broad-Seal; (See Tryal of the *Regicides* p. 145) which Answer seem'd to imply, That if it had been under the *Broad-Seal*, it would have been a Legal Pardon, tho' granted by a *King out of Possession*. But if the Doctor will insist upon it, as a good Law, that a King out of Possession has no manner of Authority; certainly, in the Time of King *Charles's Exile*, *Cromwell* had as much the Benefit of that Law, as if he had been King *de Facto*. I have now gone through the Doctor's *Points of Law*; and have shewed, that the Equity of them will undoubtedly extend to all Governments, as well as to Kings *de Facto*.

But, *Secondly*, If we understand these *Points of Law* in their proper and natural Signification; they prove no more, than that under an *Usurper* the Course of *Judicial Proceedings* ought to go on, which consist partly of *Acts of Justice*, and partly of *Acts of Grace*; p. 125. of which latter sort were *Patents of Naturalization*, as Judge *Billing* urged; that during the Exclusion

on and Exile of the Rightful Prince, the Order of Government should still be preserved, and consequently the Laws put in Execution; and that therefore all such Acts as these, tho' performed by an Usurper, (since they had no other Tendency, but to maintain the Peace of Society in general, and did not directly oppose the Claim, or weaken the Interest of the Lawful Heir) ought in Reason and Equity to be declared good and valid to all Intents and Purposes. This is the utmost, that can fairly be inferred from the *Plea of Bagot's Counsel*, and indeed it would not be reconcilable with those avowed Principles, by Virtue of which *Edward IV.* gained the Crown; nor consistent with it self, were the Doctor's Exposition of it admitted as genuine: Both because it utterly destroys the Distinction between King *de Facto*, and King *de Jure*, by supposing Allegiance to be due only to the Prince in Possession. And because it allows of this Distinction, and confesses that *Henry VI.* was King only by *Usurpation*; a Term which manifestly implies Unjust Possession; and consequently such, as the Law gives no manner of Countenance or Approbation to. On the other hand, the Sense which I have now given of it, is attended with no Inconveniencies, nor liable to any Objections. It maintains inviolably the Right and Authority of Kings *de Jure*; and yet allows to the *Judicial Acts* of a King *de Facto*, and all other that were done purely for the Preservation of the Community, an equitable Title to a Confirmation from the King *de Jure*. And this indeed is all that *Bagot's Counsel* had Occasion to demand; for this being admitted, they had Reason to hope, the Patent of *Naturalization*, granted by *Henry VI.* would come under the Denomination of a *Judicial Act*; and then their Clients Cause could be in no Danger. I must observe one thing more, before I have done with this tedious Plea;

and that is, that the Counsel argue only for
p. 126. the Validity of the Acts of *Henry VI.* not of

Usurpers or Kings *de Facto* in general, as the Doctor does; for they tell us, that *Henry* was King in Possession; and that tho' he was so by *Usurpation*, yet he was not meerly an Usurper. But it ought not to be from hence inferred, that this must be the Case of every King *de Facto*; or that all Kings *de Facto* ought to have the same Privileges, that it might be thought reasonable to allow *Henry VI.* For every Usurper may not have the same Plea, as those of the House of *Lancaster* had, especially the two last of them, who had obtained the Pro-

misses

Promises and Oaths of the *Undoubted Heirs*, for the Security of their Reign. I do not say, the House of York had hereby laid themselves under any *Legal Obligations*; never to lay Claim to the Crown; for the Judgment given afterwards in Parliament against *Henry VI.* shews the contrary: But it may be very well doubted, whether those repeated Oaths, which were taken likewise with so much Solemnity, ought not to have had a greater Weight upon their Consciences, than it appear'd they had; and it is to be feared, the Calamities which befell the *Duke of York and his Issue*, are in a great Measure to be attributed to the little Reverence that Family paid to *Oaths*. However, though *Edward IV.* possess'd himself of the Crown, without any Regard to these Obligations; he could not but be sensible, that *Henry VI.* deserved to be consider'd with some Distinction, as one that had a Right to better Usage, than Common Usurpers; for he had lived under him many Years in great Honour and Prosperity; and seem'd satisfied with his Government: So that he had Reason to look upon the Acts of *Henry VI.* as done by his own Consent and Approbation; and therefore might think himself obliged in Prudence and Decency to ratify and confirm them. But the Doctor knows the Case is very different of *Usurpers*, who never had so much as the Appearance of the Consent of the *Right Heirs* for their Possession; and therefore are necessitated to maintain themselves in the Throne by Violence. The Doctor's last Remark upon this Case, is taken from *Brook's Abridgment*, whose Words he sets down; but they amount to no more than this, *That it is said, and not contradicted, that for* p. 127. *Treason committed against a King de Facto, the Party shall be arraign'd under a King de Jure.* How little this is to the Doctor's Purpose, I have already shew'd; and need at present only take Notice of the Method of Reasoning here made use of; *It is said, and not contradicted*, be it so: But is it not said likewise by the opposite Counsel, and *not contradicted*, that the King shall not be in a worse Condition, than any common Person; and that therefore he shall, at his Return, defeat all the mean Acts of the Intruder; and that the first of *Edward IV.* (which annuls all the Acts and Grants of *Hen. VI.*) was only an Affirmance of Common Law? Do *Bagot's* Counsel make any Reply to this? Or do the Judges pass any Censure upon it? Is not their Silence therefore as much an Argument of their Consent, on this Side of the Question, as my Lord *Brook* would have it on the other? There is indeed a remarkable Case in the *Year-Books*, not taken Notice of by the Doctor; which yet may be thought more to his Pur-

pose, than any of his other Citations from those Volumes: I shall here therefore lay it before the Reader, that I may be acquitted of any Intention of concealing what may seem to countenance the Opinion I write against. It is this: Ralph Grey Knt. being taken in actual Rebellion against Edward IV, in the Castle of Brambrough; he was carried to Doncaster, and there deprived of the Honour of Knighthood in an ignominious Manner; his gilt Spurs being beheaded off his Feet; his Sword and all his Armour being likewise broken and taken from him in the open Field. After this he was beheaded: and the Reason of this Severity against him, was, for his Perjury and Doubletiness, as well towards the late King Henry VI, as Edward IV, that now is. I confess there is an Appearance of Difficulty in this Passage, which I shall endeavour to explain. We are told by *Holinshead* (in his *Chronicles* A. D. 1463.) that this Sir Ralph Grey had sworn to be true to Edward IV, and consequently had deserted p. 128. *Henry VI*, to whom before he had taken an Oath of Allegiance; but surely this could not be the Perjury and Doubletiness, for which he is here said to be punished by Edward IV; for then it must have been unlawful to embrace his Interest; and those numerous Attainders which were passed against the Adherents of *Henry VI*, were so many Instances of the highest Injustice. Was Fidelity to the House of Lancaster at the same Time a Crime, and a Duty? That is, was it Treason against *Henry VI*, to revolt from him, and at the same Instant, Treason against Edward IV, to adhere to him? Certainly no Government could be guilty of such a Contradiction; or if it could, this wonderful Piece of Justice would have been most conspicuous in the Execution of the Duke of Somerset; who was most remarkably guilty of a Breach of his Allegiance to both those Princes; and yet we no where find this Doubletiness charged upon him, as Part of his Indictment. The Lord Chief Justice *Hale* therefore delivers it as his Opinion, that this Perjury and Doubletiness against *Henry VI*, which Sir Ralph Grey is here accused, must be understood some Act of Treason he had committed in the Reign of that King, which was not intended for the Service of Edward IV, the Rightful Heir. But his own Words will best explain his Meaning; It is Treason says he, (MS. Hist. Plac. Cor. nae, l. i. c. 10.) in any Subject, while an Usurper is in full Possession of the Sovereignty, to practise Treason against his Person. And therefore although the true Prince regain his Sovereignty, yet such Attempts against the Usurper in compassing his Death have been punished as Treason, unless they were Attempts

in the Right of the Rightful Prince; or in Aid, or Assistance of him, because of the Breach of Liegeance, which was temporarily due to him who was King de Facto. And thus it was done, 4 Edw. 4. 40. 9 Edw. 4. 2. though Henry VI. was declared an Usurper by Act of Parliament, the first of Edward IV. And therefore King Edward punished Ralph Grey with Degradation, as well as Death, not only for his Rebellion against himself, but also for cause de son Perjury & Doublenesse qu'il avoit fait al Roy Hen. 6. Thus did that *Illustrious Ornament of the Bench* understand the Case I am now speaking of; from whence it is plain, his Opinion of the Powers which belong to a King de Facto, is not in the least prejudicial to the Rights of a King de Jure; for it supposes the p. 129. Allegiance due to a King de Facto, to be only Temporary and subordinate; and that it could not destroy the indefeasible Title of the King de Jure; as the Local Allegiance which an English Subject owes to a Foreign Prince, while he continues in his Dominions, does not extinguish the prior and indispensable Obligation he is under to his Natural Sovereign; but when his Duty calls, and Opportunity favours, he is bound to attend the Commands of his Lawful Prince: So that if this Exposition of the Case before us is admitted, the Friends to the Doctor's Notion will be no great Gainers by it. But, as reasonable as this Solution of the Difficulty may seem to be, I am by no means inclined to allow this pretended Case any manner of Authority in the present Question; for I am persuaded, it will be found, upon Examination, to have no Right to any Place in the Year-Books. I am sensible, it becomes me to be very circumspect, when I advance any thing that is singular in a Part of Learning, with which I am but slenderly acquainted: I shall only therefore propose my Opinion, with the Grounds of it; and leave its Probability to be determin'd by those, whose Profession has qualified them to be proper Judges.

I take it for granted, that the Year-Books are only *Autho-ritative*, as they are faithful Reports of Proceedings in the Courts of Common Law; as they represent the Pleadings, and relate the Judgments given, in the several Cases, with Truth and Fidelity: For which only Reason they have been from Time to Time approved and recommended by the Judges, as proper Guides and Directions for Practice in their Courts. If it should appear therefore, that some Cases, or Passages, are inserted as adjudged in those Volumes, which were never pleaded before either Bench, and are not properly cognizable by them; their Credit ought to be suspected, as not sufficiently warranted; and to be

sure they can never have any Influence upon Proceedings at Common Law. Now the Case before us is certainly liable to this and other Objections. As first, it contains an Historical Relation of the Success of *Edward, IV.* against the Rebels in the North, which could not possibly be pleaded in any *Court of Judicature*; for if it had been

p. 130. ever pleaded, it must have been at the Tryal of this *Sir Ralph Grey*, to whom it chiefly relates:

But it is evident, several Historical Passages occur in it, which did not happen till at least five Years after: For Instance, it appears from this Case, and our *Chronicles* agree with it, that *Sir Ralph Grey* was carried to *Doncaster*, and Beheaded soon after he was taken, which fell out in the fourth Year of *Edward IV.*'s Reign; but it is manifest likewise from this same Case, that *Sir Humphrey Neville*, who was taken about the same Time, was not executed till five Years after. This Case therefore could not be pleaded at the Tryal of *Sir Ralph Grey*; neither can it be pretended, that it was then drawn up as a Report of the Proceedings that then happen'd; since it contains an Account of some Matters of Fact, which did not come to pass till several Years following. Secondly, The Proceedings here mention'd at the Tryal of this *Sir Ralph Grey*, are not usual in the Courts of *Common Law*; but seem rather to be the Practice of the *Court Marshal*: And the Truth is, *John Stow* assures us (in his *Annals* pag. 418.) that *Sir Ralph Grey* had Judgment given upon him by the *Earl of Worcester*, *High Constable of England*; whose Relation of this Matter is approved of by *Mr. Selden*; so that then this Judgment was given in a *Court Marshal*, where absolute Power, and not the Laws of the Land, take place; which must very much increase our Wonder, how it came to find Room in the *Year-Books*, which were most certainly drawn up and published for the Service of the *Common Law Courts*. We are not like to be resolved therefore by this Case, in the Question about the Authority of Kings *de Facto*; for when we enquire after their Power, and desire to be informed by what Laws they pretend to challenge Allegiance; I believe few will be contented with such an Answer, as refers them only to *Martial Law* for Satisfaction. Thirdly, We have just Exceptions against this Report, if it may be called so, in another Respect; and that concerns the Truth of the principal Facts related in it. We are told

p. 131. in this Case, that *Sir Ralph Grey* was actually degraded of the Order of *Knighthood*, in an ignominious manner; That his gilt Spurs were bewen off his

Feet,

Feet, his Sword and all his Armour broken and taken from him, &c. But by *John Stow's* Account, which has had the Honour to be credited by *Mr. Selden*, it is evident, that he was not degraded, neither was his *Double-* p. 132.
ness against *Henry VI.* any part of the Sentence against him; which I take to be a strong Presumption at least, against the Authority of this Case.

We have now done with *Bagot's* Case; but the Doctor has more Observations in reserve from the *Year-Books*, which he fancies do abundantly support his Cause. His next Instances are from the Grants of *Richard III.* which he tells us were allowed, and never controverted in the Courts of *Henry VII.*; and then he proceeds to the Declaration of *Henry VII's* Judges, *That the Crown takes away all manner of Defects and Stops in Blood*; of which he seems to be extremely fond; he calls it *Decisive for the Authority of the King in Possession*, and fancies it is impossible to give it a solid Answer. I shall however venture to try the Force of these mighty Arguments in their proper places; and in the mean time shall desire Leave to go through the Reign of King *Edward IV.* before I take Notice of the Doctor's Evidences from that of *Henry VII.* The last Observation the Doctor pretends to make from the *Year-Books* of this Reign is, *That by the Common Law of this Realm Kings de Facto are Legislators, or are vested with the Legislative Authority.* For (says he) in the *Year-Books* of *Edward IV.* the Statutes of the *Lancastrian Kings* are pleaded as Statutes of the Realm, of equal Force and Validity with those made by *Edward IV.* himself. I answer, this may be true, and yet not sufficient for the Doctor's Purpose; for those Statutes of the *Lancastrian Kings*, which were pleaded and allowed in the Courts of *Edward IV.* were at that very Time voidable by that King; and might have been declared of no Validity, whenever he thought fit; but till such a Declaration was made, the Courts of Justice could not look upon them as actually void. So that their Existence was purely precarious; and they lived wholly by the Permission of *Edward IV.* not by Virtue of any Authority they derived from the *Lancastrian Kings.* And then the Distinction between Kings *de Facto* and *de Jure* is beyond Contradiction evi- p. 133.
 dent; if the Acts of the former are voidable by the latter, and not, *vice versa*, the Acts of Kings *de Jure* voidable by those *de Facto.* I expect indeed it should be said, that all this is affirm'd without Proof; and I confess it is so: But I must intreat the Reader's Patience for a few

Pages, and then I shall be at Leisure to give him Satisfaction in this Point.

In the next Place the Doctor assures us, That not only the Courts of *Edward IV.* but he himself in his *Acts* of Parliament, had own'd the *Lancastrian Kings* to be *Legislators*, and their *Laws* to be of equal Force and Authority with the *Laws* of any of his *Ancestors*, or with his own. His Way of proving this is as follows: *The 14th of Edward IV. cap. 2. recites at large a Statute made the 9th of Henry V. for the Protection of all Persons, that should go with the said King into France, or were there in his Service, from being Non-suited at the Assizes, &c. whilst they were absent; which Act was to continue till the first Parliament after the King's Return into England. After this Recital King Edward IV. and his Parliament enact, That the same Order and Protection shall be observ'd, and be as available for all manner of Persons, that should pass into France with him, as it was for such Persons, as did pass over the Sea with the said late King Henry V: And that all such Persons, as shall now pass over the Sea with our Sovereign Lord the King, shall have and enjoy in every Point, all manner of Advantages, as the said Persons so passing over the Seas with the said late King had by this said Statute. Here we see (says the Doctor) that Edward IV. declares that Validity of the Statute, during the Time for which it was made, to be equal to this made by himself; and challenges no more Authority for his own Law, than he acknowledges that had. This is the only Instance, it seems, he could meet with among Edward IV's Acts of Parliament; and now the Wonder is, what Service it will do him? Edward IV. says, That an Act made by Henry V. was available to all the Purposes intended by it; which was undoubtedly true; for all those that pass'd over the Sea with Henry V. did certainly enjoy great Advantages from this Statute. But the Doctor will have it, that Edward IV. does in Effect declare, that Statute was valid during the Time for which it was made; very right, if he means only, that it was *de Facto* valid, as it was obeyed; p. 134. but if he would infer from it, that therefore Henry V. was a King *de Jure*; he must pardon me, if I cannot be of his Opinion; for I cannot easily persuade my self, that Edward IV. who treats his Predecessors of the House of Lancaster with the odious Name of *Usurpers*; styles them *pretensed Kings*, and would not allow their *Judicial Proceedings* to be good without Confirmation; who declares even their *Acts of Parliament pretended Acts*, and vacates several of them expressly for Want of*

of Authority in the Makers of them; and Lastly, who in this very Act, calls Henry V. King *de Facto*, and not *de Jure*; could ever intend, the World should believe; he thought that Prince had a *Legislative Capacity*. The Doctor may flatter himself, that these are no Contradictions; but I must beg Leave to indulge my self in my Persuasion, that no candid Reader, who seriously examines the Importance of these Expressions, and diligently observes the Style of those Acts, which passed against the Title and Government of the House of Lancaster, will allow it to be possible, that the Passage now in question can fairly be understood in the Doctor's Sense. But all that he can possibly urge on this Argument, will be effectually answer'd by a View of the Proceedings of Edward IV's Parliaments; by which it will appear, that all the Acts of the Three Henrys were held to be defective in Point of Authority; And then certainly those Princes could not have a *Legislative Capacity*, who had none at all.

I say, all the Acts of the Three Henrys were held to be defective in Point of Authority, in Edward IV's Reign. Now their Acts were either such, as were done out of Parliament, or in it. That those that were done out of Parliament, were not look'd upon as valid, is evident from the Confirmation of them by (1 Edw. 4.) Edward IV. For why were they confirmed, if they did not need it? If their Authority was not at least questionable, and liable to be disputed without it? The Doctor may here tell us, if he pleases, that a Confirmation does not always imply a Want of Authority in that which receives it; because *Magna Charta* was confirm'd several times. But that could not be the Meaning of the Parlia- p. 135.
ment in the present Case; for the Preamble of the Acts assures us, that the Confirmation there granted was in eschewing of Ambiguities, Doubts, and Diversities of Opinions, which might rise, ensue, and be taken of Judicial Acts, &c. But those Doubts and Ambiguities could only happen upon account of the Power, from whence they proceeded; for upon the Confirmation of them it is added, That they shall be of like Force, Virtue, and Effect, as if they had been done in the Time of any King lawfully reigning, &c. an undeniable Proof, that it was the Want of Authority in the Prince only, which was the Reason of their Confirmation. Besides, we shall find presently, that some of the Acts of Parliament of the Three Henrys, became void purely upon King Edward's refusing to confirm them. And then surely it will be granted, that their Acts of

less Moment and Authority, stood much more in need of a Ratification from the King *de Jure*. Lastly, If the Doctor should insist upon it, that the Confirmation given by Edward IV. added nothing to the Validity of those Acts, may it not be with as much Reason affirm'd, that the Confirmation granted to the Judicial Acts, &c. of the Commonwealth and Oliver Cromwell, was equally unnecessary? I shall presume therefore to believe it to be an undoubted Truth, that the Confirmation allow'd to the Acts of the Three Henrys did imply, that they were not of sufficient Authority without it. And if this is really the Case, this alone discovers such a Defect of Power in Kings *de Facto*, even tho' their Acts of Parliament should be allow'd to be good, as will sufficiently vindicate those, who distinguish them from Kings *de Jure*: For if we take a particular View of the several Extra-Parliamentary Acts, which only became valid by the Confirmation of Edward IV. we shall perceive, that as they were many in Number, and various in their Kinds; so they were all Essential to the very Being of Government; which cannot possibly subsist, where a Power of performing them is Wanting. Let the Reader only be pleas'd to try the Experiment, and see whether he can form any other Idea of a King *de Facto*, from the Statute which confirms the Judicial Acts, &c. of the Three Henrys, than this which follows.

He is a Person that is not legally qualified to give a Commission to Judges, neither are the Proceedings in his Courts of Judicature of any Authority. He cannot create a Nobleman, or make a Bishop; and whatever Liberties, Privileges, and Immunities, &c. he grants to Cities and Corporations, they are of no Validity. His Licenses of Mortmain, and Presentations to Benefices, are voidable; and even his Grants of Wards and Marriages, Fairs and Markets, are revokable at the Will and Pleasure of the King *de Jure*. He can neither give a Pension nor a Cornody; and especially all Lands bestowed by him, are resumable, whenever his Rightful Successor is pleased to make use of his Authority. More Instances might be observed in the printed Acts and Rolls of Parliament, besides what I have here recited; which would abundantly prove, that the Authority of Kings *de Facto*, as asserted by the Doctor, was a Secret in our Constitution not then discover'd; for had that been an uncontested Doctrine, these Acts of Kings *de Facto* had never received, nor needed a Confirmation: And it will not now be thought strange, if what the Doctor

Doctor had before affirm'd, should be true, viz. *That the Grants, Licenses, Letters Patent, Gifts, &c. of the Three Henrys, are pleaded and allowed in all the Judicial Proceedings of Edward IV's Courts of Judicature to be valid, &c. for it is plain they were confirm'd by Edward IV. and thereby acquired an effectual Force against all Opposers of their Authority; but then it must be confess'd, they owed their Validity to that Prince, not* P. 137. *to the Three Henrys. So that whatever may be the Power of Kings de Facto in Parliament, it is clear, that they have so little out of it, that the common Ends of Government are not attainable under them.*

But the Doctor is confident, the Acts of Parliament of the Three Henrys stand upon a sure Foundation; for he tells us, *they have been always held valid, tho' never confirm'd; and therefore (says he) when that which is the highest Act of Government is valid, none of the rest of their Regal Acts can reasonably be disputed.* Upon this Occasion the Doctor will pardon me, if I put him in mind of a Complaint he has made against his Adversaries, that they did not duly consider, that all his Arguments are built upon *Matters of Fact, which can only be answer'd by denying them.* Here therefore he plainly transgresses his own Rule, by arguing against *Matter of Fact*; for he very well knew, that all the other *Royal Acts of the Three Henrys* were not held to be valid, as the *Confirmation* of them manifestly implied; and this was worse than *disputing* them; for it was putting their Want of Authority out of *Dispute*. Besides, was not their *Authority disputed in Bagot's Case*? Was not the *Validity of Henry VI's Letters Patent* the Point, that was chiefly controverted? Certainly this is a Truth the Doctor himself will not dispute; and if I mistake not, it deserves his particular Notice, that this *Dispute* lasted several Terms, and took up at least two Years before it was ended; so *unreasonable* were the Lawyers of those Times, and so ignorant the Judges, of the *Constitution*. Since therefore the Matter is really thus, as I have represented it; since likewise it is a Rule not to be dispensed with in Enquiries after Truth, that doubtful Propositions are to be examin'd by those that are evident; why should we not rather infer, from the *Confirmation*, which we are sure was granted to many of the *Regal Acts* of the Three Henrys, that the rest also wanted it; than affirm with the Doctor, (without sufficient Authority) that the *Acts of Parliament* of those Kings were held good without *Confirmation*, and therefore that all their other Acts ought to have

have been esteem'd so too? I will presume to
 p. 138. add, that the Doctor here again violates that
 Respect, which he professes to be due to *Faith*. For,
First, It evidently appears from some Instances upon Re-
 cord, that *Confirmation* was denied to some *Acts of Parli-*
ament of the Three *Henrys*; and that the Effect of that
 Denial was, that they were esteem'd of no Authority.
 Thus, among other Petitions, the Commons pray, ' That
 ' all Acts of Parliament, afore this Time made, for Pay-
 ' ment and Contentation of Fees, Rewards, and Cloathing
 ' of your Justices, Barons of your Exchequer, Serjeants at
 ' Law, Attorney, &c. be good and in Force. " To this the
King answers; ' As to this Article, it is thought necessary,
 ' that they be truly paid; but not to affirm their Assign-
 ' ment of Payment and Contentation by Authority of Par-
 ' liament; but that it be at the King's Pleasure. " Here
 we see an *Act of Parliament* loses its Force only for want
 of *Confirmation*; the bare Denial of which, in that pub-
 lick Manner, was equivalent to *annulling*, or declaring
 it *void*. Another Instance is this which follows, *Item*,
 ' Prayen your Commons, that all Acts made by Authority
 ' of eny Parliaments, holden in the Time of the preten-
 ' ded Reigns of eny of the said late Pretended Kings, for
 ' Contentation or Payment of eny other Sum or Sums of
 ' Money, due unto the Mayor and Fellowship of Mer-
 ' chants of the Staple of *Caleys*, for the Time being; for
 ' Money lent by them to eny of the said late Pretended
 ' Kings, or for Payment of Wages of the Captain and
 ' Souldiers of the Town of *Caleys*, and the Marches there;
 ' be in their Force and Effect, and available to the Felaw-
 ' ship and Merchants of the said Staple now being, and
 ' to their Successours, for Contentation and Payment of
 ' the said Sums of Money yet remaining due and unpaid
 ' to them, specified in eny of the said Acts of Par-
 p. 139. ' liament, &c. " (*Rot. Parl. Edw. 4.*) But the
 King's Answer was, *This Article is respited*; and
 if I remember rightly, it was not till four Years after,
 that the *Rolls of Parliament* tells us, there was any Pro-
 vision made to secure the Payment of those Debts. So
 that here is a *National Debt*, contracted upon *Parliament*
Security, (very probably for the Carrying on a War a-
 gainst *France*, as well as for the Payment of the Garrison
 of *Calis*) in Danger of being entirely defeated, had not
 King *Edward* at last, by his *Royal Assent*, entiled it to a
 Legal Payment. What will the Doctor now say to this?
 Will he persuade us, that these were no Acts of a pub-
 lick

lick Nature? Or rather, may we not hope, that he will retract the following Passages, which, it is to be fear'd, have had too much Credit with many of his Readers? *No body*, says the Doctor, *has been able to produce one single Act, of all the numerous Acts that were made by the Three Kings of the House of Lancaster, that was esteem'd to want the Confirmation of Edward IV; for without it they were held to be of as good Authority, as his own Acts.* And again; *I have shew'd, that there was not one of the numerous Publick Acts, that were made in the Reigns of the Three Henrys, ever confirm'd; and yet stood, and (except such of them as have been repealed) do stand in Force at this Day.* These Expressions are strong and peremptory; and would indeed answer the Doctor's End, if there were any Truth in them; in which respect I must have Leave to say, they are now visibly defective. The Reader will undoubtedly observe, that the Instances I have here recited, of *Acts of Parliament of the Three Henrys*, which became void by being denied a *Confirmation*, are not to be found in the printed *Act of Parliament* of the first of *Edward IV*. And true it is, that they are there omitted, as well as some other Matters, very worthy of Regard in this Controversy; but he will meet with them in the *Rolls of Parliament*. Now, though I do not pretend to produce any more Instances of *Acts of Parliament*, which became void by being denied *Confirmation*; I would however ask, whether these Two are not sufficient for my Purpose? If they had an original complete Authority before *Edward IV*'s Time, I would fain know, how they came to need his *Confirmation*? And if they did not need his *Confirmation*, it would be a great Favour to inform me, how they became void by the Refusal of it. I would carry these Queries a little farther: Did not the Manner of voiding these *Acts of Parliament* plainly denote a Defect of Authority in those that made them? And might not the same Defect of Authority be objected against every *Act of Parliament* made by the Three Henrys, as well as these Two? The Doctor perhaps will ask, how then came any of the *Acts* of those Kings to be good, which do not appear to have been confirmed? But this is a Question I am not bound to answer; it is enough for my Purpose, if I can shew, they were not good without the Approbation of the King *de Jure*; and that I think I have effectually done; and need not be solicitous, from whence they derived their Validity, provided they did not owe it to Kings *de Facto*. For this is

is as good, as Ten Thousand Arguments, to demonstrate, that the Parliaments of *Edward IV.* did not own the *Legislative Authority* of his Three Predecessors; which is the Point now in Question. I might urge farther, that if the *Acts* of Parliament of Kings *de Facto*, that were of greatest Moment, were not of Force without the *Confirmation* of the King *de Jure*; then certainly the Invalidity of the rest of their *Acts*, which were of less Consequence, could not reasonably be disputed: That is, since it is evident, that the Security given by the Parliaments of the Three *Henrys* for Money borrowed for the Publick Service (a Matter certainly of the utmost Concern in all Governments) was insufficient; it will follow, that all their other *Acts of Parliament*, could not be esteemed of good Authority. Secondly, I say again, that it is without sufficient Warrant, that the Doctor affirms, *That all the Acts of Parliament of the Three Henrys were good, though not confirm'd*; because it is manifest, some of them were declared, void; which would not have been done, if they had
 p. 141. been good; for no *Act* can be declared void, but what was defective in some respect before; but no other Defect can be assign'd, as a Reason for such a Declaration, in the present Case, but only that of Authority in the pretended *Legislators*. Now it appears evidently from the *Rolls of Parliament*, (*Rot. Parl. i Edw. 4.*) that all *Statutes, Acts, and Ordinances, made in and for the Hurt, Destruction, and Avoiding of the Right and Title of King Richard, or of his Heirs, to ask, cleyne, or have the Crown Royal, Power, Estate, Dignity, Praeeminence, Governance, Exercise, Possessions, and Lordships, &c. are ordained, declared, and established to be void, and be taken, bolden, and reputed void, and for nought, adnulled, repealed, revoked, and of no Force, Value, or Effect, &c.* For this Clause being declaratory, does not only imply, that they were not to be of any Force for the future; but also, that they wanted it before. And this cannot be doubted by those, that will give themselves the Trouble of perusing the whole *Act*; in which it is affirmed, *That the Right and Title of the Crown of England, after the Decease of King Richard II. by Law, Custom, and Conscience, descended to Edmund Earl of March; and that Faith and Ligeance was due to him; and also Richard Duke of York is said, in his Life, to have been very King, in Right, of the Realm of England.* Which Expressions could not possibly have been used, if they had not look'd upon those *Acts of Henry IV.* by which he endeavour'd to secure the Succession of the Crown to his Issue and Family,

mily, as ineffectual for the Purposes they were intended. And thus, when *Henry IV.* regain'd the Crown, and by forcing *Edward IV.* out of the Kingdom, was fully possessed of every Part of it; what he did in Parliament, during that Interval, was intirely vacated by the said *Edward.* (Rot. Parl. 17 Edw. 4.) The Act of Parliament, by which this Annulation was declared, is worthy of the Doctor's serious Consideration, and therefore I shall transcribe it for his Use.

' Whereas in the most dolorous Absence of our Sovereign Lord the King out of this Realm, being in the Parts of *Holland*, and before his victorious Regress into the same Realm; in a pretended Parliament, unlawfully and by usurped Power, summon'd by the Rebel and Enemy to our Sovereign Lord the King, *Henry VI.* late in Deed and not of Right King of *England*, holden in the Palace p. 142. of *Westminster* the 26th Day of *November*, in the Ninth Year of our Sovereign Lord the King that now is, under the coloured Title of the said *Henry*, the Forty Ninth Year of the Inchoation of his pretended Reign, and the First Year of the Readeption of his Usurped Power and Estate, divers and many Matters were treated, communed, wrought, to the Destruction and Disheerison of our Sovereign Lord the King, and of his Blood Royal, by the Labour and Exhortation of Persons not fearing GOD, nor willing to be under the Rule of any Earthly Prince, but inclined, of sensual Appetite, to have the whole Governace and Rule of this Realm under their Power and Domination: Which Communication, Treates, and Workyngs, doth remain in Writing, and some exemplified, whereby many Inconveniencies may ensue to our Sovereign Lord the King, and his Blood Royal, which GOD defend, and all Noblemen at this time attending about the King, and all his other Liege People and Subjects, oneles due Remedy be provided in this Behalf. Our said Sovereign Lord the King, by the Assent of the Lords Spiritual and Temporal, and at the Request of the Commons in the said Parliament assembled, and by Authority of the same, for the Surety of his Noble Person, his Noble Issue, and the Inheritable Succession of the same, and for the Surety of all the Lords, Noblemen, and other his Servants and Subjects, hath ordained and established, that the said pretended Parliament, with all the Continuances and Circumstances depending upon the same, be void and of none Effect. And that all Acts, Statutes, Ordynauces, Treates, Communications, Conventions, and Workyngs in

* in the said pretended Parliament treatyed, communed
 * &c. and all Exemplifications made upon the same, or any
 * Part of them, and every of them, shall be reversed, can-
 * celled, void, undone, revoked, repealed, and of no Force
 * nor Effect." The Doctor is indeed positive, that the
 Authority of those Laws, which Henry VI. made on his
 Readeption of the Regal Dignity, had been own'd, if they had
 not been repeal'd by Edward IV. for these Statutes (as he is
 pleased to affirm) made in the Forty Ninth Year of Henry VI.
 did not sink of themselves, as some have imagined, and urged
 for an Argument; but were repealed and reversed, as my Lord
 Chief Justice Coke says; for Edward IV's Act doth not declare
 them void, but ordain and establish them to be void. A very
 acute and judicious Observation! For then it

P. 143. seems King Edward IV.'s Friends stood all this
 while attainted, his Issue excluded the Succession,
 and his Laws repealed, till the Time of passing the Act,
 which was the Space of eight Years; for so long it was, be-
 fore he thought fit to annull the Proceedings of Henry VI.
 in his pretended Parliament. Now it must be observed, that
 Edward IV. held a Parliament in the Twelfth Year of his
 Reign, and another in the Seventeenth, (when the Act we
 are now speaking of pass'd) in which no attainted Person
 could possibly sit; and consequently, during all this Space
 of Time, the Acts of Parliament made by Henry VI, being
 in full Force according to the Doctor's Assertion, Edward
 IV.'s best Friends were incapacitated for Sitting in Parlia-
 ment: The Doctor may believe this if he pleases; but I
 must desire to be excused. The true Reason undoubtedly,
 why at last it was thought fit to annull the Proceedings of
 that Parliament of Henry VI, was out of a prudent Regard
 to the Uncertainty of Humane Affairs, of which that Age
 was abundantly convinc'd. Another Revolution might
 happen, when the Friends to the Lancastrian Family would
 have it in their Power to revenge themselves upon their
 Enemies; and then those Acts of Attainder, which had not
 been reversed, might be in Execution: And besides, Hen-
 ry VI, in this last Parliament, had again entail'd the Suc-
 cession of the Crown upon his own Issue; and (which might
 be judged a Matter of no small Concern) upon the Failure
 of it, had settled it upon the Duke of Clarence and his
 Children. Now considering the Temper of that Duke
 (who died that Year) and the Mutability of those Times,
 it might be thought dangerous to suffer that Act (tho' made
 in a pretended Parliament, unlawfully and by usurped Power
 summon'd by that Rebel and Enemy to King Edward IV, Henry
 VI,

VI, late in Deed and not of Right King of England) to continue unrepealed. I make use of that Word, because I think I may do it without any Prejudice to my Opinion; for tho' the Doctor seems persuaded, that whatever Acts are repealed, must needs be of Force till they are so; I cannot allow this to be always true; of which I have just now given an Instance, in the Acts of Henry IV, which were declared Null and Void in the first Parliament of Edward IV; and yet in that very Statute they are said to be repealed too. It is true, the Acts of Henry VI. are not declared void in this of Edward IV, in express Terms; which Omission the Doctor thinks remarkable for his Purpose; but the Words made use of are certainly of equal Importance; for they are ordained and established to be void, which is equivalent to declaring them so. In a word, if the Laws made by Henry VI. before his Dispossession, were not held of sufficient Authority, as I have proved by some Instances; it must be very strange, if those made by him upon his Recovery of the Crown, should be good and valid.

I shall proceed farther in my Enquiries into the Truth of the Doctor's Position, That none of the Acts of Parliament of the Three Henrys were confirm'd by Edward IV. The Doctor confesses, that some Acts of Parliament relating to the Town of Shrewsbury, and to the Founding some Religious Houses, were confirm'd by Edw. IV; but then he says, this was probably through Caution, and at the Desire of those that were concerned in them: I readily agree with him in this Point; but the Question is, whether this Caution was not necessary; and whether the Validity of these Acts, for which this Confirmation was desired, might not have been controverted without it. Confirmations of this Nature do not use to be desired, or granted, but upon real, not imaginary Occasions; and therefore if Conjectures were to be admitted in this Case, they ought rather to be in Favour of the former, than the latter; especially considering the Intention of the Act, in which these Confirmations were made. The Preamble says, it was to prevent Ambiguities, Doubts, and Diversities of Opinions about the Validity of Acts of Parliament; and therefore the Doctor must give me Leave to infer, that this Confirmation was no necessary thing. Besides, allowing this Caution to have been needless, yet even this is an Argument against the Doctor's Hypothesis; for if the Legislative Authority of Kings *de Facto* was an undeniable Part of the Constitution, which had been always universally

fully acknowledged, and never disputed; how
 p. 145. came Doubts to arise on a sudden, in Peoples
 Heads, about the Validity of the Acts of the
 Three *Henrys*? What Reason was there, why any Subject
 should put himself to the Charge and Trouble of soliciting
 an Act of Parliament to secure a Title, that had never been
 called in Question? And this will be thought the more
 strange, when it is observ'd, that tho' the Doctor calls these
 Acts which were confirm'd, *Acts of a Private Nature*; yet
 they were such, as Multitudes of Persons were concerned
 in: All the Inhabitants of the Town of *Shrewsbury*, and all
 those that derived any Benefit from the *Religious Houses*
 founded by the House of *Lancaster*, whose Number could
 not be small and inconsiderable. Surely it would be very
 surprizing and unaccountable, to find People *so much afraid*
where no Fear was, if it had not been a prevailing Opinion in
 those Times, that the Acts of Kings *de Facto* needed *Confirma-*
tion; but such an Opinion could never have obtain'd it, had
 the *Constitution* been such, as the Doctor represents it. To all
 this let me add, that it was at the Desire, not only of those
 that were immediately concern'd, that these Acts were
 confirm'd; but also of the *House of Commons* too; for all *Acts*
of Parliament, in those Days, were in their first Formations
 only Petitions of the *Commons*, who could not be supposed
 capable of making that any Part of them, which never had
 a Precedent to countenance it; and if the Doctor's Opini-
 on be true, wanted even the least Appearance of Reason
 to justify and support it. To conclude therefore, should
 we allow it to be true, that these were the only Acts of the
 Three *Henrys*, that were confirm'd by *Edward IV*; yet this
Confirmation is a Proof, that those *Acts* were not thought of
 sufficient Authority without it. And then I may ask the
 Doctor to give one single Instance out of all our Records, of any
 Act of Parliament made by a Rightful King, that ever was
 confirm'd for Want of sufficient Authority. This Question
 was put to the Doctor with great Assurance, as he is pleas'd
 to say; but I am persuaded, with as much Judgment: And
 it is worth while to observe, how the (*Defence*, p. 70.) Do-
 ctor answers it. The Acts (says he) of the 12th of Charles II.
 were confirm'd in the Thirteenth of Charles Second; and this
 he tells us, is an Instance for him, and a famous one.

Well! if the Doctor only may speak with Assu-
 p. 146. rance, who can help it? But I hope, without
 Breach of Modesty, we may ask what he meant
 by this Answer; and how it was to his Purpose. The
 Question was, Whether Acts made in a Legal Parliament
 by a Rightful King, were ever confirm'd, by Reason of a
 Defect

Defect of that King's Authority: The Doctor says, Yes; because King *Charles II.* confirm'd the Acts made in the *Convention*; this is wonderful: For the Doctor knows very well, that those Acts were not confirm'd for want of Authority in King *Charles II.* when they were made; but for want of Authority in that *Convention*, or *Parliament*, upon the account of its not being called by the *King's Writ*. The Doctor is too well acquainted with our *Constitution*, to be ignorant, that there are certain Essential Forms to be observed in the *Summoning, Electing, and Constituting Legal Parliaments*, by the Omission of which their Proceedings will be questionable at least, if not void; and this may undoubtedly (39 Hen. 6. c. 1.) happen under Kings *de Jure*: But how is this applicable to the Case of *Henry VI.* whose Acts were confirm'd only upon the Account of a Defect in his Authority, and not upon any Suspicion of Irregularity in the Assembling of his Parliament? Well, but the Doctor asks, how it came to pass, that there were no more Acts of Parliament of the Three *Henrys* confirm'd, if they were not of sufficient Force without it? I answer; That it is very probable, that many more were confirm'd, than those the Doctor mentions; but that some more were confirm'd, is certain and undeniable. For, *First*, when *Richard Duke of York* laid Claim to the Crown, he granted and agreed, that all other Acts and Ordinances of Parliament (besides those that concern'd the Inheritance of the Crown) should be good and sufficient against all other Persons; (Rot. Parl. 39 Hen. 6. n. 15.) which Concession prevented many Inconveniencies of a Change. And *Edward IV.* was obliged by the Interest of his Government, and by this Precedent by his Father, the first Claimer to approve of the Concession. Besides, the same Concern for the Publick Good and Welfare, which prevail'd with King *Edward* to confirm the *Judicial Acts*, &c. of the Three *Henrys*, done out of Parliament, would necessarily oblige him to do as much for many of their Acts of Parliament, which manifestly provided for the general Benefit and Advantage of his People. It is true, the Act which confirms the *Judicial Proceedings*, &c. of those Princes, seems plainly to except their Acts of Parliament from that Confirmation; but even that Exception overthrows the Doctor's Assertion; for if it was a certain Truth, (as he would make us believe) that those Acts wanted no Confirmation; it was impertinent to tell the World it was not intended them: And it is not easy to conceive, such an Instance can be produced of Acts of

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Parliaments,

Parliament, the Authority of which was indisputable, that were particularly excepted out of an *Act of Confirmation* for no other Reason, but only because they did not need any. It is very probable therefore, that King *Edward* took care to intimate his Pleasure, that all those *Acts* of his *de Facto* Predecessors, which were thought of publick Use and Service, should still be put in Execution, notwithstanding we do not meet with any express *Act* of Parliament, by which they were formerly confirm'd; and the true Reason, why only those particular *Acts*, which concern'd the Foundation of *Religious Houses*, and the Town of *Shrewsbury*, were mention'd, seems to have been, rather to secure them from the *Act of Resumption*, which had passed just before in this Session of Parliament, than to supply the Defect of Authority in the Kings of the House of *Lancaster*: For by this *Act of Resumption*, all *Lands, Rights, and Powers*, being restored to the Crown, which had been granted away by the Three *Henrys*; the very Sites of *Religious Houses* founded by them were resumable, without a particular Exception; and upon the same Account the Town of *Shrewsbury* stood in need of particular Favour, for the Preservation of those Privileges, which had been conferr'd upon it by the Bounty of those Kings. But, Secondly, It is certain some other *Acts of Parliament* of those Princes of the House of *Lancaster*, were confirm'd by *Edward IV.* besides those mentioned by the Doctor: As an (*Rot. Parl. 1 Edw. 4.*) *Act* for the *Cloathing*, &c. of the *Judges*, and the Letters Patent of *Henry VI.* to *Jaquette*, of *Luxemburgh*, Duchess of *Bedford*, granted in *Parliament*, are also confirm'd. All Commissions of *Sewers*, for which they had the Authority of *Acts of Parliament* made by *Henry VI.* are likewise declared Good; p. 148. which plainly shewed, that those *Acts* were not held of sufficient Force, to warrant the Proceedings of the Commissioners. And Lastly, several *Acts of Parliament* made by *Henry VI.* against the *Breakers of Leagues*, &c. with Foreign Princes, are expressly confirm'd, but at the same time it is declared, that the said *Confirmation* shall not extend to the second of *Henry V.* VI; which affords us another remarkable Instance of an *Act of Parliament* made by a King *de Facto*, which became void by the King *de Jure's* bare Refusal to confirm it. I doubt not however, but it will be still ask'd, Why don't we find more *Acts of Parliament* of the Three *Henrys* confirm'd, if it was necessary? How comes it to pass, that so many of their *Laws* have been executed ever since their Reigns, with-

on any Appearance of a Ratification from their Lawful Successor? If they did not receive their Authority from the Makers of them, from whence did they derive it? Now, if this Objection signifies any thing, it will prove as well, that Laws may be made without Bishops, without a House of Commons, without the Concurrence of the *Three Estates*, and even of the King himself; for Instances may be easily given of *Acts and Ordinances*, which have had the Force of Laws in *England*, which were defective upon one or other of those Accounts. Thus Mr. Prynne tells us, That several *Acts* are printed in the *Statute Book*, as *Acts of Parliament*, which had no Authority; And my Lord Ellesmere (in his Speech about the *Post Nati*) has mention'd several *Proclamations*, which had the Force of Laws. It has likewise been acknowledg'd, that many *Constitutions*, which were originally enacted by a *Foreign Authority*, (as some *Papal* and *Legitimate Constitutions*) are binding in *England*, by Virtue of the *Royal Sufferance*, and the free Consent of the People; yet surely it does not from thence follow, that the Pope had any Authority to impose them. But this will appear more evident by the following Observations. A Learned Author has assured us, that some Ordinances of *Simon Montfort* had as much the Force of Laws, as if they had been made by King *Henry III.* And 'tho' it is an establish'd Truth, that the Assent of the Commons is absolutely necessary in making Laws, and without it nothing can deserve the Name of an Act of Parliament; yet my Lord Chief Justice Coke assures us, That the 5th of *Richard II.* concerning Heresy, tho' protested against by the Commons, was put in execution, and continued to be observed as a Law, till it was repealed by *Edward VI.* and Queen *Elizabeth.* The same thing is affirmed by Mr. Fox, of the 2d of *Henry IV.* c. 15. That the Commons never gave their Consent to it; and the Lord Chief Justice Coke concurs with him in his Opinion of this Statute, and likewise of the 2d of *Henry V.* c. 7. The Force of which *Acts* was felt by the Subjects, till *Henry VIII.*'s and *Edward VI.*'s Reigns; and afterwards in that of Queen *Mary*, till their final Repeal by Queen *Elizabeth.* I may now ask the Doctor the same Question he puts to his Adversaries, (*Defence*, p. 62.) what sort of Laws these were. Will he say they were *Statute Laws*? That could not be, for they were not enacted in a *Parliamentary Way*. Were they *Common Laws*? That was also impossible at the Time when they were first put in execution. When he answers

these Questions, his Adversaries will be able to tell him; what sort of Laws those of the Three *Henrys* were. Customs, he says, (*View*, p. 24.) are sometimes by Acts of Parliament turn'd into Statute Law, but Statutes can never be turn'd into Common Laws or Custom. But therein he neither speaks Accurately, nor according to Truth: For, First, Tho' Statutes are sometimes made in Affirmance of Common Law; yet Common Law is not thereby turn'd into Statute; for then it would cease to be Common Law. Secondly, It is not true, that Statutes can never be turn'd into Common Law; for my Lord Chief Justice *Hale* has given it under his Hand, (*History of the Common Law*, ch. 1. p. 3.) That many of those things, that now obtain as Common Law, had their Original Parliamentary Acts or Constitutions made in Writing by the King, Lords, and Commons; tho' those Acts are p. 150. now either not extant, or if extant, were made before Time of Memory, &c.

I shall only mention one Instance more, which alone might be sufficient to shew, that the Validity of Laws does not always depend upon the Authority of the first Makers of them; or that the Commands of Persons not legally qualified to give them, may be observ'd and obeyed, as equal in Authority to the most Sacred Laws of the Kingdom. King *Richard II.* being forced to yield to the Violence of the Times, issues out his Writs for a Parliament to meet on the 30th of September, the 23d Year of his Reign; on which Day he resign'd up his Crown; and the Duke of Lancaster took Possession of it, by the Name of King *Henry IV.*; and thereby that Parliament was actually Dissolv'd, the very first Day it met, as the Parliament Roll of *Henry IV.* declares (*W. Prynn's 4th Part of a Register*, &c. of Parliament Writs. Sect. 5. p. 449, 450, &c.) *Henry IV.* being thus declared King, does upon that very 30th of September issue out his Writs, in his own Name, for a new Parliament, to be held at *Westminster* on St. Faith the Virgins Festival, the 6th of October then next following. Now there being only Six Days Space between the Teste of these Writs, and the Day of the Parliament, it was impossible, to make any new Elections of Knights, Citizens, and Burgeses, throughout England, in so short a Space; upon which Account, the Knights and Burgeses sent to the Parliament summon'd by King *Richard*, were continued, and forthwith return'd for this, as if they had been newly elected, by Virtue of this New King's Writs. This is Mr. *Prynn's* Account of this Parliament, which I am persuaded will be found true upon Examination; and if we consider farther, that

that King *Richard* was a Prisoner at the Time when he sign'd his Writs for a Parliament, at *Chester*; perhaps there never was a *Convention*, which consisted of Members more illegally assembled. For, *First*, Being not *elected* by their respective Counties and Boroughs, they could not possibly be qualified to represent them. And, *Secondly*, King *Richard* being manifestly under a Force, when he issued out his Writs, by which they were first *Elected*, their Proceedings could never have a just and legal Title to the Name of Laws, unless confirm'd by that Prince, when restored to his full and entire Liberty. What shall we say then to the Laws enacted by that p. 151. *Convention*, by which the Eleventh of *Richard II.* was confirmed, and that of the Twenty First of his Reign repeal'd, and many other *Acts* passed, which have hitherto been put in Execution, and are held of Force at this Day; Had they ever been declared good by a subsequent Parliament regularly assembled, this would be a sufficient Vindication of their Authority; but where is the *Act* to be found? It is true, in the next Parliament, *Henry IV.* confirms all the good Laws made by himself and his Progenitors; (Rot. Parl. 2 Hen. 4. 3.) but this Confirmation could not be of Force enough, to authorize any *Acts*, which were not good Laws before their Confirmation; for by the Rules of Common Law, the Confirmation of a void thing is also void: Upon which account *Syderfin* tells us, (*Syderfin's Reports*, Part 1. Rep. 1.) That it was made a Question among the Learned, whether the *Acts* of the Convention (*A. D.* 1660.) were good, notwithstanding the Confirmation in the 14 *Car. II.* I confess, I see no Ground for any Doubt in this last Case; for the *Act* of Confirmation duly consider'd, clearly obviates all possible Questions, and particularly that which he states, of which the Parliament was aware. For, *First*, They are careful not to call it a Parliament, but only the Lords and Commons assembled; and the *Acts*, only *Acts* of the Lords and Commons, consented to by the King. *Secondly*, They declare, the assembling and acting in that Manner, is not to be drawn into Example. *Thirdly*, They not only ratify and confirm, but enact and declare the *Acts* there mention'd to have the Force of Laws, as if made in that Parliament; whereby all imaginable Doubts were effectually prevented, and the Authority of those *Acts* of the Convention beyond Contradiction establish'd and secur'd. But nothing of this Nature was done by *Henry IV.* in his subsequent Parliaments; neither does any thing appear upon Record sufficient to determine any Controversy that

should arise concerning the Validity of the *Acts* of (what is call'd) his *First Parliament*. From all which Instances it is manifest, that the *Acts* and *Orders* of Princes and Assemblies, which had no *Legislative Capacity*, may be observed as *Laws*, though they never had any due *Confirmation*; and then it is also evident, that the Doctor has not proved his Point; supposing it to be true, *that* p. 152. *the Acts of the Three Henrys were always executed as good Laws, tho' never confirm'd*; for it will not from thence follow, that their Authority was good and unquestionable.

Thus I have laid down the Reasons, why I cannot admit of the *Legislative Authority* of the *Three Henrys*; and suggested some Difficulties, which will not suffer me to allow the Execution of their *Acts* of Parliament to be a good Argument for their original Validity. In a word, I have offer'd some Proofs, in my Opinion, of Weight enough, to satisfy an unprejudiced Reader, that the *Acts* of Parliament made by the House of *Lancaster*, were not in themselves of sufficient Force and Authority to oblige King *Edw. IV*; and this I imagine is all, that is needful for my Purpose. For it is a Doctrine laid down by my Lord Chief Justice *Coke*, (in *Calvin's Case*.) that *Kings that succeed by Hereditary Descent, are bound by the Acts of their Predecessors*; but then they must be supposed to be *Lawful Predecessors*; because no other Reason can possibly be assign'd, why this Rule did not take place in the Case of *Edward IV*, but only the Defect of Title in the Princes of the House of *Lancaster*. From whence we may observe this remarkable Distinction between a *King de Facto*, and a *King de Jure*; viz. That the *Acts* of *Kings de Jure* do bind their Successor, but those of *Kings de Facto* do not bind *Kings de Jure*; which overthrows effectually all the Doctor's Reasonings from the *Acts of Parliament* of the *Three Henrys*. When I say, that *Edward IV* was not bound by the *Laws* of the *Kings de Facto* his Predecessors, I would not be supposed to mean, that they were all absolutely void at his Acquisition of the Crown: For then it would be hard to conceive, how any of them could be capable of a *Confirmation*, according to the Maxim above-mention'd, *That the Confirmation of a void thing is itself void*: And the Truth is, to be void, being the same Thing as to have no Existence: it cannot be pretended, that a *Confirmation* gives a Being to that, which had none before; but only supplies those Defects of Strength and Authority, which it wanted. If I may therefore presume to speak freely on a Subject, which I am by no means qualified to be con-

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fident in, I would distinguish between the *Acts of*
Parliament of these Three Kings of the House of *p. 153.*
Lancaster; some whereof I would venture to say,
 were only *voidable* by King *Edward IV*, and the rest actually
void upon his *Accession to the Crown*. First, I am of Opinion, that
 some (and those the much greater part) of the *Acts* of the
 Three *Henrys*, were only *voidable* by King *Edward IV*, and
 not actually *void* at his *Entrance upon the Throne*; such were
 all those *Acts of Parliament*, which did not in the least pre-
 judice the Right and Interest of the King *de Jure*; and were
 conducive to the general Good of the Subject, and the
 Peace and Happiness of the Government: but then they
 depended entirely upon the Good-Will and Pleasure of *Ed-*
ward IV, whether their Authority should be fully establish'd,
 or utterly reject'd, in order to which a *Declaratory Act* was
 manifestly requisite, for the Quiet of the Subject, and the
 more orderly Proceedings in the Courts of Justice; with-
 out which they must have remain'd in the same precarious
 Condition, during his whole Reign. This is a rational
 Account of King *Edward's* Conduct, with respect to the
 Laws of his Three Predecessors; for though they were good
 against the Subject who had already given his Consent to
 them; yet they could not bind the King against his Will and
 Approbation, which he might give, or refuse at his own
 proper Time; and therefore tho' he confirm'd some, and
 reject'd others, yet we meet with an Instance of one, which
 seem'd to retain some Authority, till the 14th Year of his
 Reign; which clearly proves, that all that while their Obli-
 gation was not fix'd and determin'd; as not being completely
valid without a *Confirmation*, nor *void* without a *Declaratory*
Act. So that these *Acts* of Parliament of the Three *Hen-*
rys, remaining still upon Record, were executed by the
 Courts of Justice, and Officers of the Kingdom, without
 any Opposition or Interruption from the King; and there-
 fore were of Force only by his *Permission*, not by
 the Authority of the Kings of the House of *Lan-* *p. 154.*
caster. In a word, as it is declared by *Act* of Par-
 liament. (25 *Hen.* 8. 21.) that tho' the Pope had no Au-
 thority to impose his Decrees upon this Kingdom, yet many
 of them, for a long while, obtained the Force of Laws by
Royal Sufferance, and the free Consent of the Subjects; the
 same thing may be said of the Laws of the Three *Henrys*:
 They were of no Authority by Virtue of any *Legislative*
Capacity in the Makers of them; but being of Publick Use
 and Service, by the *Sufferance* of *Edward IV*, and his Suc-
 cessors, and the Approbation of the People, they, have been
 constantly

constantly received and executed, as if they were made by Princes of an undoubted Title. And for a farther Proof, that this is no singular and unwarrantable Opinion, the following Instance will deserve the Reader's Perusal. King Henry VIII. having great Occasion for Money, which he was ashamed to ask for in Parliament, (their late Bounty to him having more than answered all his just Expectations) appoints Commissioners to collect a *Benevolence* throughout his Kingdom: (See *Ld. Hubert's Life of Hen. 8. An. 525.*) Now this being directly contrary to an Act of Parliament, made by Richard III. that Statute was objected by one of the City Lawyers, against any farther Proceedings in that Collection; but it was answer'd immediately by the King's Counsel, *That Laws made by Usurpers oblige not Legitimate Princes. That Richard III. was not only a Tyrant, but a Murderer of his own Nephews, &c. That Henry VIII. being the True and Undoubted Heir of the Crown, could be tied thereby no farther, than it pleased himself; it being absurd to think, that a Statute invented by a factious Assembly, and approved no otherwise, than by a Criminal in the highest Degree, should bind an Absolute and Lawful Monarch; wherefore if they had no better Evasion, it was not fit to maintain this.* Such was the Opinion in that Reign of the Laws of Kings *de Facto*; p. 155. and the Consequence of it was, that the King proceeded in collecting the *Benevolence*, without any Regard to Richard III.'s Statute. This Piece of History is a clear Proof, that I have very good Authority for my Opinion, that the Laws of Kings *de Facto* do not bind Kings *de Jure*, and are only of Force by their *Permission and Sufferance*; To conclude therefore, the Distinction between a King *de Facto*, and a King *de Jure*, is hereby sufficiently evident, that the latter can declare the other's Acts null and void, at his Pleasure; but the former has no manner of Authority over the Acts of a King *de Jure*. And this is agreeable to the unanimous Opinion of all the Judges, which they deliver'd in a Question about the Grants of King Edward IV, in which they affirm, *that they are all good without any Confirmation*, which cannot be said reciprocally of the Acts of Kings *de Facto*. But, *Secondly*, Tho' many of the Acts of Parliament of the Three *Henrys*, may very reasonably be allow'd to be only *voidable* by the King *de Jure*; yet there were some of a different Nature, which were undoubtedly *void* upon King Edward's Accession to the Crown; and such were all those, which were made against the *Title, Person, and Interest of that King, and his Family*. The Doctor allows it to be true, that the bare Pos-

session

session of the Crown voids all *Attainders*; and certainly the Reason is the same for the Nullity of all other *Acts* against the Right and Dignity of the True Heir, when he has gain'd his Inheritance; and therefore I shall presume to say, that those *Acts* of the House of *Lancaster*, which limited the Succession of the Crown to their own Family, would have been of no Validity, though *Edward IV.* had never annulled them by the Authority of Parliament. If it should be asked, why then they were declared *void*, if they were *void* without such a Declaration; I answer, That Princes have always thought this necessary, for the greater Security of themselves and Adherents, lest another Revolution should put their Enemies again in Possession p. 156. of the Throne; and then all the *Acts* made by them, which had not been vacated, would appear in Judgment against them, to their utter Ruin and Destruction. Thus in the Case of *Henry VII.* though the Judges had given their Opinion, that the Crown took away all Stops and Defects of Blood, yet that Prince took Care to have it ordain'd in Parliament, that all Records, wherein there was any Memory or Mention of his *Attainder*, should be defaced, cancelled, and taken off the File. (*Lord Bacon's Life of Hen. 7. Engl. Edit. Fol. p. 13.*) Thus *Edward IV.* voided all those Laws, that had been made to the Disherison of the House of *York*; and *Henry VI.* upon his Recovery of the Crown, annull'd those of *Edward IV.* against his Title. In the like manner did *Edward IV.* some Time after his Restauration, treat the whole Parliament of *Henry VI.*: But from these Instances it cannot fairly be inferred, that those Princes thought these *Acts* had Authority, without such an Annulment; for we find, that sometimes the *Acts* of the most impudent Rebels, and vilest Usurpers, have had the Honour of being declared *void* in Parliament, though no body doubted of their being so without such a Declaration. Thus the *Acts* of *John Cade*, a most abominable Tyrant, horrible, odious, and errant false Traitor, and all Enditement, and all things depending thereof, had and made under the Power of his Tyranny and Rebellion, are declared of no Record, nor Effect, but void in Law, (31 H. 6. c. 1) And all *Attainders* by *Oliver* and the succeeding usurped Powers, (12 Car. 2. 12.) and all Orders, Ordinances of both Houses, or either House of Parliament, for imposing Oaths, Covenants, or Engagements, levying of Taxes, &c. are declared void; (13 Car. 2. 1.) though in the same *Act* it is said, They were all null and void in their first Creation, and Making. I have now examined every thing, which appear'd to me considerable in the Doctor's Plea for the Legislative Power of the

the Three *Henrys*; and have shew'd it to be defective in the several Points, which were most insisted on. At the same Time, I have made it evident, that the Example of *Edward IV.* is a clear Proof of the true Authority of Kings *de Jure*, in Opposition to the pretended Authority of Kings *de Facto*.

In the next Place the Doctor urges the Laws p. 157. of *Richard III.* as a good Argument for his Legislative Capacity; and several Pages are spent, to convince us, that all his Acts of Parliament have been constantly executed, as equal to those of the most undoubted Authority; excepting only such, as were repealed by *Henry VII.*; for that King (*says he*) did not pretend to declare any of them void; which he certainly would have done, if the Constitution would have borne it, since some of the Acts of *Richard III.* were of that odious and detestable Nature, and his Person so justly abhorred, that it was doing him too much Honour to repeal those Acts, if they could have been set aside for Want of Authority in the Maker of them. To this purpose does the Doctor argue: And I very readily agree with him; I allow it to be true in Fact, that *Henry VII.* did not declare any Law of *Richard III.* void; and I am entirely of his Opinion, that the Constitution would not bear it; nay I am willing to grant, that this was a good Proof of the Legislative Authority of *Richard III.* with respect to *Henry VII.*; and fully demonstrated, that the Laws of the former did bind the latter. But then I must dissent from the Doctor, when he infers from it in general, that the Laws of Kings *de Facto* are, in their own Nature, and without any Exception, good and valid. For had *Henry VII.* as true an *Hereditary Right*, as he pretended, we should have met with a much different Account of his Proceedings on Record, from what we now find; but being himself in Reality no other than a King *de Facto*, it was impossible for him to act otherwise, than he did. How could he declare the Acts of his Predecessor void, upon the Account of his being an *Usurper*, when he knew, he was no better himself? Could his Laws be esteemed of greater Authority than *Richard III.*'s? And what a happy Discovery would it have been to his Subjects, to acquaint them, that whatever Laws he imposed upon them, they could not oblige his Successor; and consequently would have but a precarious Existence after his Demise? So that *Richard III.* considered with regard to *Henry VII.* was a King *de Jure*; as every King *de Facto* is to his Successor, who has no better Title; for whatever Laws are made by the one, will bind the other: And this undoubtedly is the true Reason,

Reason, why *Henry VII.* repealed those Laws of *Richard III.* which he had a mind to get rid of; it being otherwise impossible to destroy their Authority. p. 158.

And nothing can be a more remarkable Proof for this Purpose, than an Instance, which, the Doctor fancied, did very much favour his *Hypothesis*; and that is in the Case of those, who had been attainted by *Richard III.*; who were not permitted to sit in Parliament, till their *Attainders* were reversed by a particular *Act* for that purpose; but had *Henry VII.* been King *de Jure*, he would not have been obliged to those Formalities; for it may be remembered, what I before observed, that *Edward IV.* did not reverse those *Acts of Attainder* made by *Henry VI.* against his Adherents, till above seven Years after his Restauration; in which Space of Time he had held several Parliaments, wherein those Lords and Gentlemen must have sat, before the Reversal of their *Attainders*; unless the Doctor can imagine, so great a Number of Persons, remarkable as well for their Quality and Fortunes, as for their Fidelity to their Prince, were all that while incapacitated to sit in Parliament. Thus it is evident, that the *Acts* of *Richard III.* were only valid against *Henry VII.*, who having no better Title than *Richard*, could not pretend to declare them *void*, without bringing all his own *Acts* into question. If it should be now asked, how those of *Henry VII.* continued in Force, considering that he was succeeded by a Prince, that had an undoubted Right, not a bare King *de Facto*; the Answer is obvious; for this King of an undoubted Right was *Henry VIII.* his Son, who had too much Respect and Honour for his Father, to set a publick Mark on him as an Usurper, by annulling his *Acts*; and for this Reason it is, that the *Acts* of *Richard III.*, as well as those of *Henry VII.*, have always continued in Force; because *Henry VIII.*, who had Authority enough to vacate them, and did vacate the *Act* against *Loans*, yet thought fit to permit them to be executed during his Reign; especially considering, there was nothing in them to the real Prejudice of the Crown; but on the contrary, they were generally of great Use and Service in promoting the Interest of his Government; and having been thus put in Execution through *Henry VIII.*'s Reign, none of his Successors would afterwards give themselves the Trouble of calling their Authority in question. This I take to be a reasonable and true Account of the present Validity of those *Acts*, and no other, p. 159. I believe, can possibly be given, which is consistent with the Power exercised by *Edward IV.*, and *Henry VIII.*,

VIII, which belongs as well to every King *de Jure*, as it did to them. When I call *Henry VII. King de Facto*, I therein rather comply with the Humour and Inclinations of that Prince, than my own real Sentiments: For from the Time of his Marriage with the Heirefs of the House of *York*, he undoubtedly became King *de Jure*; and even before that Time, from the very Entrance of his Reign, he may be look'd upon as having a *Presumptive Right* to the Allegiance of the People of *England*, as he had obliged himself by an early Promise to marry that Princess, and the whole Nation was persuaded he would not fail to perform it. For before he invaded King *Richard*, he had pass'd his Word, that he would make that Princess his Wife; which gave the greatest Encouragement to the Nobility, who considered the true Interest of their Country, when they assisted him in that great Enterprize: And in his first Parliament, the Commons did not forget to Address him to the same Purpose; and the Lords Spiritual and Temporal, rising from their Seats, and standing before the King, as he sat upon his Royal Throne, with their Heads bowed, in a low Voice humbly Requested him, to make the Lady Elizabeth his Queen. To whom he answer'd, with his own Mouth, That he was content to proceed according to their Desires and Requests. (Rot. Parl. 1. Hen. 7.) So that the People of *England*, from the first Commencement of his Reign, had reason to consider him as the Husband of the Right Heir to the Crown; and upon that Account their Obedience and Fidelity to him will admit of a fair Excuse and Justification. But *Henry VII.* esteem'd it a Diminution to him, to owe his Title to his Lady; and therefore, as if he was afraid of nothing so much, as being thought a *Lawful Prince*, he chose to found his Claim on his own *Hereditary Right*, his Victory, and the Pope's Confirmation; which were utterly incapable of affording him any real Support and Defence. His *Hereditary Title* has indeed been much talked of, and often taken for granted even by Persons of p. 160. Note and Eminency; and therefore it may be worth while, to give that Matter a thorough Examination.

It has been surmised, that *Henry VII.* had a Title to the Crown, as being descended from *John of Gannet*, Duke of *Lancaster*; and tho' it be true, that the Pretensions of the House of *Lancaster* were condemned as *false and groundless* in the first Parliament of *Edward IV.*; yet it is urged, that *Henry VII.* having repealed that Act of *Edward IV.* by which *Henry VI.* his Queen and Son were attainted and disabled; all the Judgments made against that Family were consequently

consequently annulled, and their Right revived. But these Assertions will soon appear to be Mistakes. First, We find it in the Record of Parliament, 1 Hen. 7. that the King [viz. Henry VII.] told the Commons with his own Mouth, that his Coming to the Crown was as well by a Just Title of Inheritance, as by the True Judgment of GOD, &c. and in one of the printed Statutes it is said, his Coming into England was for the recovering and obtaining his Just Title and Right to this his Realm of England. (1. Hen. 7. 6.) So that it seems his Right and Title commenced antecedently to his Possession of the Crown, and before any of the Laws of Edward IV. which had set aside the Title of the House of Lancaster, were repealed. But surely the Beaufort Family, from whence only he derived his Descent by his Mother, were the Illegitimate Issue of John of Gaunt, and Katherine Swinford, being born before Marriage, and consequently, by the Laws of England, incapable of claiming any Rights by Inheritance. They were indeed afterwards legitimated by Act of Parliament; and rendred capable of every thing, but the Succession to the Crown; from which they were excluded by express Words in that Statute, as my Lord Chief Justice Coke observes; and therefore p. 161. it is impossible to conceive, how Henry VII. could, with any Colour of Justice, lay Claim to the Crown of England by Descent. But, Secondly, It is pretended, that all those Acts of Edward IV. which destroyed the Title of the House of Lancaster, were repealed in the first Year of Henry VII. Thus Sir George Treby says, (*Debate at the Conference concerning the Abdication*, p. 50.) ' That in the first of Henry VII. there is an Act made, that sets aside all the Acts and Attainders made against his Line, and consequently repealed 1 Edward IV., which repealed 1 Henry IV. And so far Dr. Higden agrees with him, as to affirm, ' That Edward IV's Attainders of Henry VI. were revers'd and annull'd, and Henry VI's Title restored by Act of Parliament, in the first Parliament of Henry VII.' And again, ' Henry VII. in the first Year of his Reign, pass'd an Act of Parliament, wherein it is enacted, That all Acts of Attainder or Disablements against the late King Henry VI. be void, annull'd, and repealed, &c.' So that the Force of all the former Declarations and Acts of Parliament against Henry VI. is taken off by this last Act of Parliament, which restores his Title. Now the Truth of this Matter will best appear by a Sight of the Act it self, which I shall here set down out of the Record. 1 Hen. 7. The King our Sovereign Lord remembering, how against Righteousness, Honour, Nature,

*Nature, and Duty, an inordinate, seditious, and slanderous Act was made against the most famous Prince of Blessed Memory, King Henry VI, his Uncle, in Parliament, in the first Year of Edward IV. late King of England; Whereby his said Uncle, contrary to due Allegiance, and all due Order, was attainted of High Treason. Wherefore our Sovereign Lord, &c. ordained, that the said Act, and all Acts of Attainder, Forfeiture, and Disablement, made or had in the same Parliament, be Void, Annull'd, and Repealed, and of no Force, or Effect. From whence it is evident, that by this Repeal only those particular Acts, or rather Clauses of Acts, were abrogated, whereby the Heirs of Henry Earl of Derby were declared evermore unable, and unworthy to have, joy, occupy, hold, or inherit any Estate, Dignity, Pre-eminence, Embarrowments, or Possessions within the Realm of England, &c. (Rot. Parl. Edw. 4.) All the other Judgments of Parliament, for the Title of Edward IV. and against that of the House of Lancaster, still remaining unrepealed, and in full Force. The utmost therefore, that can be collected from this Statute of Henry VII. is no more than this; That those Incapacities, which arose from Corruption of Blood, and Forfeiture, were now removed from Henry VI. and his Heirs: But that was not sufficient to restore his Title to the Crown; the Act of Parliament, on which it depended, having been annull'd by Edward IV. (Rot. Parl. 1. Edw. 4.) and never again revived. And indeed there was no Reason, why Henry VII. should attempt to restore the Title of the House of Lancaster; since it could not possibly help him to any Pretence of Right; and would be prejudicial to the Claim of the House of York, the firmest Support of his Throne, upon which only he could rely. But though Henry VII. were no more than a King *de Facto* before his Marriage, I am willing to consider him under a much different Character afterwards, when he became the Husband of the undoubted Heir to the Crown. In which Case, tho' the Queen alone was Legally entitled to the Executive Power; yet the most scrupulous Subject had no Reason to think her injur'd, when it was exercised by her Husband; on whom, it might very justly be presumed, she had freely devolv'd all her Right and Authority. In this respect therefore the Title of Henry VII. could not well be disputed; since in Judging of the Rights of Princes, nothing more is necessary, than to be assur'd, that Allegiance may be paid to them, without doing any Wrong to a third Person; by which Rule the Authority of Henry VII. became unquestionable; and without the least Doubt or Scruple,*

he

he might very honestly be acknowledged as King *de Jure*. So that from the Time of his Marriage, we are to look upon him as perfectly endued with a p. 163. Legislative Capacity, which secures all his subsequent Laws from the Objection, to which those made in the Beginning of his Reign were liable.

From these Observations on the Title of *Henry VII.* I proceed to the Consideration of that Statute (1 Hen. 7. 1.) of his, which has been often cited, as the surest Support of the Authority of Kings *de Facto*; and is still relied upon, as the safest Retreat, when all other Arguments fail: But if (Dr. *Higden's View*, p. 64.) the *Authority of Kings de Facto* had been always acknowledged; and the Allegiance, which this Statute declares to be due to them, was ever paid in this Realm; and both the one and the other justified by the Common and Statute Law of the Kingdom, in the Reigns of *Hereditary Kings*; why could not *Henry VII.* be contented with the Provision already made for the Protection of his Adherents? What Occasion was there for a new Law to establish a Privilege, which had been long a known Part of the Constitution, and the Birth-right of every English Subject? And it is apt to increase one's Wonder, to see my Lord *Bacon's* Authority alledged, to shew the *Wisdom, Justice, and Magnanimity* of this Statute; for where was the *Wisdom*, to do a Thing that was unnecessary? The *Justice*, to give what no-body had Reason to demand? Or the *Magnanimity*, to defend those, who were in no manner of Danger? But it may be, these are nice and frivolous Questions; and therefore I hasten to a strict Enquiry into the true Meaning of this Statute; and that certainly may be best collected from the Condition and Circumstances of the Law-giver, and the End for which the Statute was intended. If we consider the Circumstances of *Henry VII.* at the Making this Statute, it is plain, he was a King *de Jure*, as well as *de Facto*; and the Doctor, to do him Justice, is very willing, it should be admitted, that he was so. And indeed, whoever impartially ex- p. 164. amines the Circumstances of those Times will easily be satisfied, that it was impossible for *Henry VII.* to be dispossessed of the Throne by any Person, that had so good a Right as himself; so that he had no body to fear, but an unjust Pretender; and was only in Danger from those, that had no Legal Claim to the Crown: He had no Reason therefore to be concern'd for the Safety of his Friends, as a King *de Facto*; for he knew, he was *de Jure* too, with respect to any one, that should oppose him; and surely (how

(how equitable soever such an Act might be in some respects) he could never be moved to it from a just, and wise Calculation of any real Advantage, that would accrue to him from it; but had Reason rather to apprehend the contrary: For, considering the Posture of Affairs at that Time, that he was daily threatned with a powerful Invasion, which for ought he knew might succeed; he might easily foresee, that his Enemies then would reap the greatest Benefit from this Act: For had *Henry VII.* lost a Battle, and been driven from his Throne, the People would have been bound, by Virtue of this Act, in the Sense now put upon it, to have defended the Usurper against him; and could never have been punished for so doing. Whatever therefore might have been the real Design of this Law, it could not certainly be the primary and chief Intention of it, to support the Thrones of ambitious Intruders, by what Means soever they succeeded in their bold Enterprizes: Such a Law as this, was so apparently dangerous to *Henry VII.* that it cannot well be imagined to have been ever in his Thoughts. And there is this farther Prejudice against the Doctor's Opinion, that this Statute (if intended wholly for the Advantage of Kings *de Facto*) would have occasion'd the severest Censure imaginable upon *Henry VII.*'s Reign; for if (*according to the Words of the Act, 11 Hen. 7. 1.*) it was against all Law, Reason, and good Conscience, that Subjects going into Wars with Kings *de Facto*, should lose or forfeit for doing this their Duty of Allegiance; the Doctor will find it a very difficult Matter to discover, upon what Principles of Justice so many Persons were attainted, for no other Reason, but for being in the Service of *Richard III.* The Doctor may easily satisfy himself in this Matter from the Rolls of Parliament, where he will find many Persons of Note attainted, purely for following the Fortune of that King, and assisting him in the Battle of *Bosworth Fields*; and it deserves the Doctor's particular Reflexion, that at the very Time, when this Just and Merciful Act (for so I find it is esteem'd) was passed, several of those Gentlemen continued still under *Attainder*, as appears from the Records of the 11th and 12th Years of *Henry VII.* It must be confessed, the Doctor has been pleas'd to take Notice of this Objection; but then he has given it this Answer. *It is objected (says he) that these Princes sometimes attainted some of the Leaders of the Opposite Party for adhering to their Rivals. But when they did this, their constant Way of Proceeding against such Persons, was by Attainders in Parliament ex post Facto,*

Facto, and not by *Indictments* in the ordinary Course of Proceedings; which shews, at the same time, that to serve the King in Possession was not a Fault, nor could be punished as such by the Laws that were then in Force. Now, I would ask the Doctor the Meaning of *Attainders* in Parliament *ex post Facto*; for surely none were heard of *ante Factum*. Laws indeed have been sometimes made *ex post Facto*, whereby Actions have been subjected to Punishment, which were not Criminal when they were committed: But the Doctor knows, this is not the present Case; for it cannot be affirmed, that any new Laws were made in *Edward IV's* and *Henry VII's* Reigns, which made People *Traitors*, who might not have been condemn'd as such, by Laws before in Being. That many were judg'd guilty of Treason, and attainted upon that Account in their Parliaments, is very certain; but we are to presume, those Proceedings were founded upon a Law already made: For my Lord Chief Justice Coke tells us, (Inst. 4. ch. 1. p. 39.) That by Order of Law a Man cannot be attainted of High-Treason, unless the Offence be in Law High-Treason; and therefore he ought not to be attainted by general Words of High-Treason, by Authority of Parliament. He owns indeed, that this had sometimes been done; but then he does not pretend to give any other Instances of it, besides the Case of *Elizabeth Barton*, and Lord *Cromwell*, in *Henry VIII's* Time. So that it were to be wish'd, the Doctor had been less forward in affirming, that the *Attainders* in Parliament were occasion'd, for Want of Law to punish Persons out of Parliament; for their *Attainders* suppos'd them to be Criminal, but did not make them so; and therefore they might have been tryed, and condemn'd in the Ordinary Courts of Justice, had it been thought necessary. The Truth is, it is a vain Imagination of the Doctor's that the Reason of *Attainders* in Parliament was, because such Persons could not be proceeded against by *Indictments*; the contrary being easily demonstrated by Multitudes of Instances, which would abundantly shew, that the true Cause of giving Judgment in these Cases in Parliament, was rather for the sake of Expedition, upon the account of the Number of Criminals, and to prevent unnecessary Delays, especially when the Facts, which were the Reasons of those *Attainders*, were Notorious; and therefore there was no occasion for those tedious Methods of Proof, which are used in the inferiour Courts of Justice.

I return now to *Henry VII's* Statute, which could not be intended purely for the Benefit of Kings *de Facto*; but that the Safety and Interest of that Prince's Friends and Adherents were consulted by it, can never be doubted; for by Virtue of it, they had been effectually protected, tho' *Henry VII.* had lost his Throne. And this will appear from the following Considerations, which will much contribute to the deciding our present Controversy. *First*, That all Laws made by Kings *de Jure* bind their Successors. *Secondly*, That *Henry VII.* was King *de Jure* at the Time of making this Law; and could not be dispossest'd of his Throne, but by a Person, who had less Right to it than himself: And *Thirdly*, That when this Act was passed, *Henry VII.* was daily threatned with an Invasion from *Perkin Warbeck*; the Issue of which, in regard to the Hatred, which was still borne him by the Friends to the p. 167. House of *York*, could not but be doubtful and uncertain. These things consider'd, it will certainly be allowed, there was great occasion for such a Law, as would effectually secure his Adherents from the Danger of incurring a Forfeiture of their Lives, Estates, and Liberties. For, as *Henry VII.* had attainted those that fought for *Richard III.*; so *Perkin*, if he had succeeded, might have used those, that were in Arms for *Henry VII.* in the same manner; unless disabled by some Legal Restraint, such as this Statute was; which provides amply for the Security of all those, that attended *Henry VII.* in his Wars. In a word, as without such a Law the Party of *Henry VII.* would have been in great Danger, had their Army been defeated; so by Virtue of it, they must have been entirely safe: Because as *Henry VII.* and his Parliament would not presume to slight the Authority of the Laws of *Richard III.* but esteem'd them all good and obligatory; upon the same Principles, whoever had forced *Henry VII.* from his Throne, and taken Possession of it, must have been obliged by his Laws, and could have done nothing against them, without Violence and Injustice. So that whereas it had been usual in former Revolutions, to attain in Parliament the *Defeated Party*; this Law of *Henry VII.* was an effectual Bar against such Proceedings; and would be able to protect his Friends from all manner of Forfeitures and Attainders. This I take to be the genuine and true Meaning of this Law: For from hence it will presently appear, why Serving *Henry VII.* in his Wars, is styled in this Act, *doing their true Duty and Allegiance*; and why it is also said, *to be against all Laws, Reason, and good Conscience, that Subjects should suffer* for

for so doing; viz. because *Henry VII.* having a Right at that Time to be consider'd as King *de Jure*, he had a good Title to the Obedience of his Subjects; and consequently the Punishing them upon that Account, would have been an Action in it self highly unreasonable, and unjust. And this was so far the Case of *Richard III.* that had he made such a Law as this, for indemnifying those, p. 168. that fought for him; they could not possibly have been attainted by *Henry VII.*: So that the Wisdom of this Law, thus explained, is highly to be extolled, and is truly admirable; since now, whatever might be the Events of War, Subjects could never suffer for defending their Lawful Prince; the Power of the prevailing Invader being now limited to that Degree, that he must first do Violence to the Laws, before he could hurt the Persons or Fortunes of those that opposed him. A Consideration undoubtedly of great Moment, for the encouraging of Subjects to persevere in their Fidelity to Lawful Princes; for tho' it ever was, and will be against Reason, and good Conscience, to punish Persons for doing this their Duty; yet it will always be found true, that the general Laws of Nature have never that Authority and Influence over Ambitious Princes, as those particular Laws of the Kingdom they are to Govern. And the Reason is plainly this; because they had much rather offend GOD, whom they do not fear, than their People, whom they do. And therefore, tho' it was an Action in it self just, and lawful, to defend *Richard III.* against *Henry VII.* who had no manner of Title to the Crown; yet since *Richard* was, in other respects, no better than a King *de Facto*; and no Act of Parliament had particularly provided for the Safety of those, that fought for him; we see *Henry VII.* was so little moved with any Considerations of Reason and good Conscience, as to proceed with the utmost Severity against them in his Parliaments.

By what I have said, it is evident, that *Henry VII.* could propose no Advantage to himself from this Statute, any otherwise, than as he was King *de Jure*; p. 169. that is, as he was in Danger from no Adversary, who had a better Title than himself. And from thence I shall infer, that the Interest and Security of the Followers of Kings *de Facto*, was not the original Design or Intention of this Law. If it is objected, that whatever the Intention of the Lawgivers might have been, the Words of it are plainly applicable to Kings *de Facto*; and in this Sense have been often expounded by some of the most eminent Lawyers; I must deny, that the Words are thus fairly

to be understood: And indeed if they were, the Act would be manifestly inconsistent with itself. *First*, Because, tho' a *King de Facto* is a *King for the Time being*, yet he is such a one, as could not possibly be thought of in this Statute; for *Kings de Jure* cannot well be supposed to intend the Good and Interest of *Usurpers*; nor could *Henry VII.* for the same Reason, mean any other by a *King for the Time being*, than such a one, as himself was: And whoever is of a contrary Opinion, may as well believe, that *Henry VII.* when he made this Statute, design'd it only for the Service of *Perkin Warbeck*, who was like to be *King for the Time being* in a few Months, for any thing that could be certainly foreseen to the contrary. *Secondly*, This Law would be inconsistent with it self, if applied to *Kings de Facto*; for the last Clause of it utterly excludes such an Interpretation. The Words are these; *Provided alwaie, that no Person or Persons shall take any Benefit or Advantage by this Act, which shall hereafter decline from his or their said Allegiance*: That is, whoever at this Time (when *Henry VII.* was threatned with an Invasion) should declare for *Perkin Warbeck*, and should endeavour to support his Interest, and maintain him in his unjust Acquisitions; they were not to have the Benefit of this Statute, if ever *Henry VII.* should again recover his Right; though they might plead they had been in the Service of a *King for the Time being*. From whence it is evident, even by the Authority of this Statute, that there may be some *Kings de Facto*, to whom it may be dangerous to do any Service; I mean such, as should depose a Rightful Prince, (which was the Design of *Perkin Warbeck*) and place themselves in his Throne; for it is expressly declared in the Clause abovementioned, that this Statute should not be available to any Persons, who act in the Defence of such Usurpers against the Prince, to whom their *Allegiance* was before due.

But if, it shall be still thought reasonable to believe, that this Statute was at first intended, and may, be made use of, for the Interest and Benefit of the Adherents to a *King de Facto*; I must however desire those, who are of this Opinion, to abate something of their Confidence, till those, who are the proper Judges of such Matters, have by their publick Resolutions determin'd the Sense of it. For tho' some great Lawyers have left certain Passages in their Writings, in Favour of this Opinion, yet the Meaning of this Law was never yet ascertain'd by any Judicial Proceedings. It was pleaded indeed by the *Regicides*, at their

their Tryal; and they were the only Persons, that ever claim'd any Benefit from it; but it is well known, the Court over ruled their Plea, as not at all pertinent, or of any manner of Use upon that Occasion. It is true, Chief Baron *Bridgeman* did then give his Opinion (*Cook's Tryal*) concerning this Statute, viz. *That it was made for a King de Facto against a King de Jure*: But I shall shew, that his Lordship's usual Exactness herein fail'd him; which could not possibly have happen'd, had the Consideration of this Statute come properly before him, and any Stress been really laid upon it; for then he would have had more Leisure to form his Judgment, before he had deliver'd it. So that if it should fall out (as who can tell, what *Revolutions may happen in a Country given to Change?*) that a King *de Jure* should by *Force and Violence* dispossess a King *de Facto* of his Throne; who can be sure, what the Opinion of Parliament, or the Judges may be, when those that shall have followed the Fortunes of the King in Possession, shall plead this Statute for Impunity? Surely it may be a Question, whether then such Persons will be allowed to have *done their true Duty of Allegiance*; and consequently, whether I am in the wrong or no, is at least a Point not yet decided; cannot safely be submitted to any private Judgment; and may possibly at last be determin'd agreeably with the Opinion I have now delivered. I am in the next place to take Notice of certain Passages, which the Doctor has cited, to prove, that some of the greatest Lawyers have been of his Mind in the Exposition of this Statute; but since my Lord *Bacon* and *Bridgeman* are the only two he has mention'd, who speak directly, and purposely concerning it, I need not trouble myself at present about any other. As for my Lord *Bacon*, I am at a Loss, how to understand him, when he says, (*Hist. Hen. 7. p. 144.*) *This was a Law of a strange Nature, rather Just than Legal, and more Magnanimous than Provident*; for it is not easy to conceive, how a Law can be *Just*, and not *Legal*; unless his Lordship meant, that it was not agreeable with the Laws then in Being, and the Constitution of the Government: Which Opinion would be directly contrary to what the Doctor has asserted throughout his Books; where we are often told, that the Indemnity of those, who serv'd a King *de Facto*, was sufficiently provided for before *Henry VII's* Reign. — I return to my Lord *Bacon*; He tells us, that this *Law was more magnanimous than provident*: And soon after he says, it had *Parts of prudent and deep*

p. 171.

Forefight; because People were thereby hindred from busying themselves in prying into the King's Title; for that however it fell, their Safety was now provided for. And upon the same Account, he thinks it agreeable to Reason of State; because otherwise the Subjects might trouble themselves with Enquiries into the Justness of the King's Title, or Quarrel. But I have clearly proved, that Henry VII. at the Time of Making this Law, had a good Title against every body; since his Queen's Consent was never doubted of, whose Claim and Opposition alone could render him an Usurper. So that he had no Cause to be disturbed about the People's prying into his Title, since they could not dispute his Queen's. For, I beg Leave to add, had Perkin Warbeck been the Real, as it was well known, he was only the Fictitious Son of Edward IV; and had his Enterprize succeeded; Henry VII.

was too wise a Prince, to imagine, this Law of p. 172. his would have been able to secure those, that fought for him: He knew very well, by the then late Example of Edward IV. that the Laws of Kings *de Facto* could not bind Kings *de Jure*, especially when directly against their Interest and Advantage; and therefore had he been in Danger from any *Rightful Pretender*, he would not have given himself the Trouble of making a Law, that could do his Party no Manner of Service. Let it not now be thought too great a Presumption in me, to say, my Lord Bacon was mistaken in this Point; for he could not be a Man, if he was not subject to Error. My Lord Keeper Bridgeman's Opinion is in the Tryal of Cook the Regicide; where speaking of this Law of Henry VII. he has these Words; King Henry took Care for him who was King *de Facto*, that his Subjects might be encouraged to follow him; to preserve them, whatever the Event of the King was. And again, That that King Henry VII. did, was to take Care of the King *de Facto* against the King *de Jure*. This Passage the Doctor fancies is fully to his Purpose; though, in another Place, he allows Henry VII. to be a King *de Jure*; and the Truth is, who the King *de Jure* was, that Henry VII. took Care against in this Statute, will be past any one's Power to find out. I must take the Liberty therefore to say, that his Lordship suffer'd himself here to fall into this Error, through Inadvertency, and want of a due Regard to the Circumstances of Henry VII. who was so far from being barely a King *de Facto*, at the Time we are speaking of, that it will be very difficult to have a right Notion of a King *de Jure*, if he was not so. It had been objected, that when the Duke of Northumberland

land was tried for being in Arms for the Lady *Jane Grey*, it would have been proper for him to have pleaded this Statute, if it was really for the Benefit of those, that served a *King de Facto*; and it had likewise been observed, that he did actually alledge in his *Defence*, that he acted by a *Commission* under the Great Seal, and by Order of a *Privy Council*; to which the Reply made by the Court was, *That the Great Seal, which he pretended for his War-rant; was not the Seal of the Lawful Queen of the Realm, but the Seal of an Usurper, who had no Authority.* (Stow's and Holinshead's *Chronicles*.) Now the Doctor has not thought fit to take Notice of this Declaration of the Duke of *Northumberland's* Judges; but contents himself with the following Answer: *First*, He says, (*View p. 67, &c.*) it is to be observed, that *Queen Mary*, in a Letter she writ to the Lords of the Council, notified her Claim, and required them, upon their Allegiance, to proclaim her Title at London: That this Letter was deliver'd to the Lords, not only before they had proclaim'd the Lady *Jane*, but before they had published *King Edward's* Death, or so much as acquainted the Lady *Jane* with their Design to set her up to succeed him; as appears both from the *Bishop of Sarum's* History of the Reformation, and from *Dr. Heylin's*. The latter has printed this Letter at large; in which there is a Passage, that would induce one to believe, that she had been proclaim'd somewhere before she writ it. But, *First*, Were the Doctor in the right in all these Points of History, they would not fully turn to his Account: For were it true, that the Lady *Jane* was never in Possession of the Crown; and consequently, that the Duke of *Northumberland* did not act under the *Broad-Seal*, and by Order of the Council of a *Queen de Facto*; yet it would be nevertheless true also, that the Judges were of Opinion, that the *Broad-Seal* of an Usurper was of no Authority; which is the main thing the Doctor's Adversaries insisted upon; and therefore chiefly deserved his Consideration. *2dly*. It is not so clear a Case, as he believes, that the Lady *Jane* was not in Possession of the Crown; for not only her own Council was of that Opinion; but *Queen Mary* seems to confess it; and many Circumstances concur to shew, it was a Fact, which could not well be doubted of. *First*, For they expressly affirm it in their Letter (*July 12. 1553.*) to the Sheriff of *Kent*; which begins thus: *After our hearty Commendations, &c. Whereas the Queen's Highness Queen Jane, being presently by Just Title in full Possession of the Imperial Crown of this Realm, and other Dominions, and Pre-eminences*

thereunto belonging, &c. which I should not insist upon, if we were only disputing the Point of Right; for therein we are sure they err'd. Secondly, Queen Mary herself confesses as much; for she openly declares, (1. Mar. 4.) That *her own most Lawful Possession was for a Time disturbed and disquieted, by the Trayterous Rebellion and Usurpation of the Lady Jane Grey*; and we have observed, that the Judges gave their Opinion at the Tryal of the Duke of Northumberland, that the Broad-Seal of that Lady, being an Usurper, was of no Authority: Now she could no otherwise disturb the Possession of that Queen, than by being in the Throne herself; neither could she deserve the Name of an Usurper, but by settling the Crown upon her own Head, which belonged to another Person. Thirdly, Several other Circumstances concur to shew, it was a Matter of Fact, that cannot well be doubted of: Did not King Edward's Council openly and avowedly declare for Her? Did not all the Judges, and many of the first Quality in the Kingdom, subscribe to King Edward's Device of the Succession? And was not the chief Body of the Nobility on her side? insomuch that it may be question'd, whether the Duke of Northumberland could have been tryed, if those Lords had been excepted out of the Number of his Judges, who had been guilty of the same Crime with himself. Lastly, Was not the City and Tower of London, and all the Forts of the Kingdom, in her Hands? And was there any visible Power in the Realm for some time, that seem'd capable of opposing her Pretensions? But after all, the Doctor is positive, that *she was never settled in the Throne; but fell, whilst the Duke of Northumberland and his Faction was struggling to thrust her into it.* But she might be Queen

P. 175. *de Facto*, tho' she was not fully in Possession; for he allows the Title of King to Stephen, tho' for much the greater Part of his Reign, he was hardly Master of more than half the Kingdom; and Edward IV. is said in the Records, to have been in Possession of the Crown from the 4th of March, tho' Henry VI. was then at the Head of a greater Army than his, and the fatal Battle of Towton-Field was not fought till some while after. 3dly. The Doctor's Observations from History, against the Possession of the Lady Jane, are not so incontestable, as he may imagine. Queen Mary's Letter to her Brother's Council, which he cites from Dr. Heylin, had been first printed by Mr. Fox and Holinshead: Now, tho' she lays Claim to the Crown in that Letter, yet she did not assume the Regal Title and Style; for it is not Dated in the First Year of her Reign.

And

And Dr. *Heylin* will acquaint the Doctor, that she did not take upon her the Name of *Queen*, till she came to *Framlingham* Castle in *Suffolk*, which was eight or nine Days after King *Edward's* Death. From whence we may observe, that the Doctor is also mistaken in another Point of History, when he pretends, that Queen *Mary* had been proclaim'd *Queen*, before the Lady *Jane*: This could not certainly be done by her Order, before she took upon her the Title of *Queen*, which I have shew'd was not till the 14th of *June*; but the Lady *Jane* was proclaim'd on the 10th. Queen *Mary* indeed sent to the Mayor of *Norwich* on the 12th of *July* to proclaim her; but my Author (*Stow's Chron.*) says, finding the *Norfolk Men* not so forward as she expected, she removes with her small Party to *Framlingham*. That the Lady *Jane* knew nothing of the Design of making her *Queen*, three or four Days after King *Edward's* Death, is hardly credible; surely she knew, that King *Edward* had appointed her his Successor, a Month before: And Doctor *Heylin* (*Hist. Ref. p. 159.*) expressly affirms, That (on the tenth of *June*) the Lady *Jane* could not be ignorant of that which had been done, in order to her Advancement to the Throne. But (the Doctor adds) the Lady *Jane* was no Lawful *Queen*; she had no Consent of the States, no Recognition by Act of Parliament, as all those Kings have had, whose Royal Authority has been own'd by the Laws, without an Hereditary Title. By this Answer the Doctor has plainly alter'd the State of the Question: Hitherto he had laid it down for Law, that whoever was in Possession, was a Lawful King; now it seems, that is not enough; but the Consent of the States, and Recognition in Parliament is necessary. I am not now at Leisure to dispute this Point with the Doctor: But if the Power of the People is so considerable, that they can create a Title, when they please, by their bare Consent; I am afraid, they can destroy one too, only by withdrawing it; and what any Republican can desire of the Doctor more than this, is hard to divine. Lastly, The Doctor concludes, The Duke of Northumberland had no Right to plead this Statute; for being the principal Author of this Revolt, he was by the last Clause of this Act cut off from any Benefit of it. This Act was made for the Security of those, who submit to a King, for the Time being, after he is establish'd; not for those, that overturn Governments; who whatever they may plead for themselves, it can never be the Eleventh of Henry VII. Here we have the Doctor's Confession, that whoever are instrumental in putting the Lawful Heir from his Right, may be truly term'd *Revokers*; and consequently

quently cannot claim any Benefit from this Statute. So that had the Lady *Jane* reign'd as many Years, as she did Days; and had Queen *Mary* at last forced her from the Throne; the Duke of *Northumberland* would have been still in the same Danger, and liable to be punish'd as a Revolver. This, by the Doctor's Leave, is such a Blow to the Power of Kings *de Facto*, as could not well be expected from their profess'd Advocate; for now it seems, those Persons, to whom they owed most, are least capable of their Protection; and their best Friends must be in the worst Condition: For whenever the Heir shall recover his Right, there is no Law to shelter from his Resentments such as oppos'd his Claim, and lent their Assistance to his Enemy. And who can tell, upon such a Revolution, how great a Number of Subjects may be comprehended

under the Name of *Revolters*? Whoever took
 p. 177. up Arms for him, or assisted him with Men and Money; the Soldiers that fought for him; the *Divines* that made it Gospel; and the Gentlemen of the *Inns of Court*, that made it Law; are all involved in the Guilt of *Departing* from their Allegiance, by Virtue of this Clause, as the Doctor has expounded it. Thus we see, into what a narrow Compass the mighty Services, which were hoped for from this *Act of Henry VII*, are reduced by the final Clause of it. When the Government indeed of a King *de Facto* is settled, and his Enemies entirely subdued, the Doctor thinks it a just and wise thing to submit and swear to him; and will warrant it to be lawful by the Authority of this Statute; but for those that shall have brought about this Settlement, who may be sometimes the chief Gentry and Nobility of the Kingdom; they are all abandon'd to the Mercy of the Injur'd Prince, if he ever returns; and must be beholden to him, if they escape with Impunity. The Doctor's last Refuge in this Case can be only this; That by Virtue of a Pardon from a King *de Facto* when he is thorowly settled, these *Revolters* will be safe against a King *de Jure*. But if the *Acts of Parliament* of those *Pretended Kings* were not of sufficient Force against *Edward IV*. it is to be feared, their *Pardons* will not be esteem'd of better Authority. The Lord Chief Justice *Montague* declares, (*See his Apology in Fuller's Ch. History*) that he would never have set his Hand to King *Edward's* Settlement of the Succession on the Lady *Jane*, if the King had not promis'd him a Pardon; which he knew would be good against Queen *Mary*, if she came to the Crown; because she could only have it as a *Purchaser*: From whence it is plain,
 he

he would not have thought himself safe, by that Pardon, if he had believed Queen *Mary* could have claimed the Crown, by Right of *Inheritance*. I would recommend this to the Doctor's Consideration. He is pleas'd indeed to add, that Kings *de Facto* have actually given Indemnity by Parliament, to those that assist'd them in obtaining the Crown; and he instances in the Acts of *Henry III.*, *Henry IV.*, and *Henry VII.* which were made for protecting those, that had been active in advancing those Princes to the Throne. But if *Edward II.* and *Richard II.* had ever recover'd their Thrones, does the Doctor seriously believe, those Acts would have been really available for the Indemnity of their Rebellious Subjects? I am persuaded, the Kings that made them, were never of that Opinion. The true Reason of these Acts was to prevent Vexatious Suits, and other Prosecutions by one Subject against another. For many Acts of Violence, and Outrages having been committed, upon the Account of such Invasions, which expos'd the Doers of them to the Severity of the Law; the Injured Subjects might have had their Remedy against those Offenders, by *Indictments* for Murder, *Actions* of Trespass, &c. unless timely disabled by Acts of this Nature; which will be always necessary for the Adherents to *unjust Pretenders*, who depose Lawful Princes. But the Case is quite different, when Kings *de Jure* are the Invaders; for whoever assists them in their Quarrel, need no Act of Parliament for their Indemnity. By what I have observed upon this Occasion, the Reader will undoubtedly be surpriz'd at the following Passage in the Doctor's *View*, p. 47. 'Those who fought for the King for the Time being wanted no Act of Parliament to indemnify them; nor had they any.' And again: 'Did the King in Possession, or his Parliament, or the Parties concerned, ever think an Act of Parliament was wanting for those, who fought for him, against a Person out of Possession, whatever Title he had, or pretended to have? Can there be one Instance given of this, in all our Laws or History?' But afterwards he tells us, (p. 68.) 'This Act [viz. 11 Hen. 7.] was made for the Security of those, who submit to a King for the Time being, after he is established.' The Doctor may try to reconcile these Passages, if he pleases. Lastly, After all that has been said concerning the Meaning, and Authority of this Statute, may it not be doubted, whether it is now in Force? My Reason is this; In King *William's* Reign an Act was pass'd, which declares the Subjects absolv'd from their Allegiance,

if

if the King of England should ever appear to be a Papist: Now this Act cannot possibly signify any thing, if Subjects, who serve and defend the King for the Time being, do their true Duty and Allegiance; as is affirm'd by this Law of Henry VII.

Having had Occasion to mention the Case of p. 179. Queen Mary and the Lady Jane Grey, I beg Leave to subjoin the Judgment of the Lord Chief Justice Hale upon that Matter. *If the Right Heir* (says he, *Historia Placitorum Coronæ MS. Vol. 1. c. 13.*) *of the Crown be in actual Exercise of the Sovereignty; suppose in one Part of the Kingdom, and an Usurper be in the actual Exercise of the Sovereignty in another; yet the Law judgeth him in Possession of the Crown, that hath the True Right; and the other is in Truth, not so much as a King de Facto, but a Disturber only; and therefore not a King within the Twenty fifth of Edward III. This was the Case between Edward IV. and Henry VI. Altho' Edward IV. took upon him the Sovereignty, and was declared King in London upon the Fourth of March 1460; yet Henry VI. was in the Northern Parts, and treated as a King, and rais'd a great Army; which being subdued by King Edward IV. in the latter End of May, in the bloody Battle of Towton-Field; then, and not till then, had Edward IV. the total and quiet Possession of the Crown; and in November following held a Parliament, wherein his Title is declared, and the Commencement of his Reign enacted to be the Fourth of March before; and Henry IV. Henry V. and Henry VI. declared Usurpers. During this Interval, from the Fourth of March to June, Henry VI. was used as King, and yet was not so much as King de Facto; Edward IV. the Right Heir, being likewise in Possession of the Regality. The like was between Queen Mary, and the Lady Jane Dudley, who was proclaimed Queen at London, by Pretence of Nomination by King Edward VI; but held not that Title above ten Days For at the same time Queen Mary openly laid Claim to the Crown, and was also proclaimed Queen: So that both being de Facto in Possession of the Crown, the Law adjudged Possession in her, that had the Right, viz. Queen Mary; and therefore by an Act of Parliament (1 Mar. c. 3.) it is enacted, that Recognizances dated Anno Primo Reginae Jane, shall be allowed as good; which needed not have been, if she had been Regina de Facto, though an Usurper: Because Judicial Acts are not Diminutions of the Regal Revenue, 9 Edw. 4. 15. 11. And if any shall say, that if Henry VI. or Queen Jane, had gotten the Victory, and Possession of the Crown, that possibly as much would have been asserted by them and their Parliaments*

ments against Edward IV. and Queen Mary; *This is an Objection of no Value; for I do not take my Measures herein from Events, which are various and uncertain; but according to the true Right of Matters, pursuant to the Laws of England, as near as I can.* p. 180.

It remains now to be consider'd, what Authority is to be attributed to the Opinion of *Henry VII's* Judges concerning the Crown's taking away all Defects and Stops of Blood; and whether it is of that mighty Advantage, as has been pretended, for Kings *de Facto*. The Doctor indeed insists (*View*, p. 20, 42, 45.) much upon it, and reposes an entire Confidence in it. Let us now see, whether this Resolution of the Judges, can afford any substantial and real Encouragement to the Advocates of Kings *de Facto*. First, I observe, that this unanimous Resolution of the Judges was *Extra-Judicial*, and consequently of less Authority, than if it had been given upon the Bench; for when they deliver their Opinions out of Court, they do not hold themselves to be upon Oath; and therefore, tho' two or more should be of a different Opinion from the rest, they do not refuse to sign the Resolution of the major Part; and so it goes under the Denomination of all the Judges. (*Cases in Parliament resolv'd in Purbeck's Case*, p. 9.) The unanimous Opinion of the Judges is undoubtedly of great Authority; but I am afraid the Doctor attributes too much to it, when he makes it a Part of the Common Law of this Realm, For it may be remember'd, that the whole Bench of Judges were at first unanimous in the Case of *Ship-Money*; and yet the Doctor knows, that Opinion was condemn'd as erroneous. I must beg Leave therefore to think it possible, that the Reverend Bench may sometimes err in their Resolutions; and whether they did not in the Case before us, is now the Question. Secondly, I affirm, that this Proposition, viz. That the Possession of the Crown removes all Defects in Blood, and all other Impediments, is not universally true; for if it were, then no Acts of Parliament for Disabling or Excluding any Persons from the Succession, could be of any Force, when such Persons are on the Throne; nor in the least restrain the Subjects from paying their Allegiance to them. An Assertion, which highly reflects upon the Honour and Wisdom of those Parliaments, which have made it Treason to invade and hold the Crown, against p. 181. the establish'd Order of Succession; which have declared, that whoever should be guilty of such an Act of Violence and Injustice, ought to be esteem'd as no better than Usurpers and Traitors; and lastly, that it is the Duty of

of Subjects to take up Arms against such Intruders, as being absolv'd entirely from their Obedience to them. In King Henry VIII's Act (35 Hen. 8. 1.) for Establishing the Succession, *Whosoever should interrupt the Succession appointed by Law, or by the Last Will and Testament of that King is adjudged a High Traitor.* And in the 1 Edw. 6. 12. the following Words are remarkable: *Be it farther enacted, that if any of the Heirs of the King our Sovereign Lord that now is, or any Person or Persons, to whom the Crown and Dignity of this Realm is limited by Act of Parliament, made in the Five and Thirtieth Year of the Reign of the late King Henry VIII. or the Heirs of any of them, do at any Time hereafter usurp, the one of them upon the other, in the Crown of this Realm; or demand, challenge, or claim the same, otherwise, or in any other Form or Degree of Descent, or Succession, &c. but only in such Manner and Form, as is declared by the said Statute; or if any of the said Heirs or Persons aforesaid, do interrupt, or let the King's Highness, that now is, peaceably and quietly to keep, have, and enjoy the said Imperial Crown, that then all and singular the Offenders, &c. shall be deemed and adjudged High Traitors, and shall suffer and incur the Pains of Death, &c. as in Cases of High Treason.* From which Passage it is undeniably evident, that Persons in actual Possession of the Crown, may be at the same time no better than Usurpers and Traitors, and liable to the Pains of Treason; and consequently, it was the Intention of those Legislators, that such Persons should be incapable to hold the Crown, notwithstanding their being Kings *de Facto*. And the Truth is, if it was possible for any Prince to be under a Legal Incapacity of possessing the Crown, one would think Henry VII. was that Person: For first of all, as descended from a Natural Son of John of Gaunt, he was excluded by Common Law; and this Exclusion was expressly confirm'd by Act of Parliament. Secondly, He had been attainted in Parliament. And lastly, The whole Kingdom had obliged themselves to take, accept, and repute King Edward IV. and his Heirs, to be Kings of England, and none other. (Rot. Parl. 1 Edw. 4.)

But it seems, no Laws can have any Force or
 p. 182. Authority against a King in Possession: This is a clear Case, by Virtue of the Resolution of Henry VII's Judges; and those Parliaments were very ignorant of their Power, which pretended to make Laws, to hinder Subjects from obeying Usurpers. Thirdly, Had it been a known Maxim of the Law of England, *That the Crown takes away all Defects and Incapacities*, according to the Doctor's Opinion; we should never meet with Acts of Parliament, which

which approve of and commend Actions done in Contempt of it. Thus, we find Attempts made by the Right Heir for recovering his Inheritance, justified as agreeable to the Laws of GOD and Nature; and the Dispossessing of the Intruder, declared Just and Legal. Let the Doctor cast his Eyes upon the following Passages, and he will be sensible, I do not impose upon him.

Richard Duke of York attempting by Force of Arms to recover his Right to the Crown of England against Henry VI. used the Benefit of the Law of Nature, not having then any Lord above him in England but GOD; and it was Lawful, and according to Law, Reason, and Justice for him so to do. (Rot. Parl. 1 Edw. 4.) And it is farther declared, That the Taking of Possession, and Entree into the Exercise of the Royal Estate, Dignity, Reign, and Governance of the Realm of England, &c. by our Sovereign Leige Lord King Edward IV. &c. and the Amotion of Henry, late called King Henry VI. from the Exercise, Occupation, Usurpation, Intrusion, Reign, and Governance of the said Realm, &c. done by our said Lord King Edw. IV. was, and is rightwise, lawful, and according to the Laws and Customs of the said Realm; and so ought to be taken, holden, reputed, and accepted. I may leave it now to the Reader to determine, whether such Princes could have a Right to the Allegiance of those, who might lawfully, and justly depose them; and I am much mistaken, if the Doctor will find it possible to elude the Force of these Authorities. I had Reason therefore to say, it is not universally true, that the Crown takes away all Defects and Incapacities; for then Kings in Possession could not possibly be Usurpers, or Traitors; neither could it be ever justifiable to attempt their Removal from their Thrones; which yet we see has been warranted by several Acts of Parliament. Lastly, The Doctor cannot reasonably imagine, that the Opinion of Henry VII's Judges should be of sufficient Authority to determine the present Controversy; p. 183. for this is making a King *de Facto* Judge in his own Cause; who will not fail to interpret the Laws, as they may best serve his Purpose. At this rate, the Doctor is sure of gaining his Point; and he may be confident there never was, nor can be in Nature, so strange a Creature, as an *Unlawful King*. I cannot however but wonder, that a Person so eminent for his Knowledge and Penetration, as the Lord Chancellor Clarendon, should so little discern the Evidence of this Maxim, as to think the Judges could not fairly apply it to the Case of Henry VII. His Words deserve to be taken Notice of, as a strange Instance of
Short-

Short-sightedness in that great Man; and therefore I shall recite them at large. 'Neither will that single Precedent (says he *Hist. Rebell.* Vol. 1. Part 2. p. 430.) 'of the 'Judges, in Case of King *Henry VII.* when they declared 'the Act of Attainder to be void by the Accession of the 'Crown, (tho' if he had been in Truth the Person, upon 'whom the Crown had Lineally and Rightfully descended, 'it was good Law) find, or make the Judges of another 'Age parallel to them; till the King hath as strong a 'Sword in his Hand, and the People as much at his Devotion and Disposal; and then the Making and Declaring 'a Law, will be of equal Facility, tho' it may be not of 'equal Justice.' Thus we see, how unfortunate this noble Lord was, in his Opinion of this Resolution of *Henry VII.*'s Judges; he calls it a *single Precedent*; he thinks it would hardly be followed by any other Judges; and plainly intimates, that it was not *good Law*, by reason of the Defects in *Henry VII.*'s Title. And this one Circumstance of its being a single Precedent, is enough to spoil the Credit and Authority of this Resolution; for may it not reasonably be doubted, whether the Judges of *Kings de Jure* would allow *Kings de Facto* the Benefit of that Maxim? And has not another great Ornament of his Profession told us, *That the Judges in Westminster Hall do sometimes deny a Case, that stands single and alone of itself?* (*Ld. Chancellor Nottingham's Argument in Mr. Howard's Cause*, p. 30.) The Doctor indeed assures us, that in Consideration of the Authority of this Maxim, *the Act that illegitimated Queen Elizabeth, was never reversed by the Lord Keeper Bacon's Advice.* But the Doctor knows very well, that *Queen Elizabeth* had a Title by the *Act of Succession*, and her Father's *Will*; whereas *Henry VII.* had no manner of Foundation, upon which he might build any Pretension to the Crown: And the Question is not, whether this Maxim would not hold good, p. 184. where *Kings de Jure* are concern'd; but whether *Kings de Facto* can legally claim any Benefit from it. I must not forget, that the Doctor afterwards confesses, (*View* p. 78.) that an Act was passed to restore *Queen Elizabeth in Blood to her Mother*: It is true, he says, *this was only that she might inherit the Estate of her Mother's Family*, which I am not concern'd to call in Question at present. But the Doctor should remember, that Princes never thought it became them to slight Acts of Parliament made against them by lawful Authority; and therefore *Henry VII.* notwithstanding the aforesaid Resolution of the Judges, took Care, *that all Records, wherein there was any Memory, or*
Mention

mention of his Attainder, should be defaced, cancell'd and taken off the Files; (Bacon's Henry 7. p. 13.) left some time or other, if they continued in Being, they might rise up in Judgment against him; a manifest Indication, that he did not think it safe to rely upon the Opinions of his Judges.

Thus I have followed the Doctor through Henry VII's Reign, which seem'd indeed to administer much Consolation to him; and to many Persons, who had long sought after Reasons to justify their Submission to the Powers in Being, but I am mistaken if any solid Comfort can be derived from them. Every thing which occur'd in the Doctor's Writings, that had the least Appearance of an Argument, I think, fully consider'd by me. But the Doctor having stepped a little out of the Way, (*View*, p. 74. &c.) to assert the Right of the Legislative Powers, to limit the Succession, (which may be very true, and yet Allegiance not due to Kings *de Facto*) I shall so far follow him, as to examine the Truth of some Historical Passages, with which he has thought fit to illustrate his Argument: And if I mistake not, this Disquisition will give me an Opportunity of clearing a Part of History, which has hitherto lain in much Obscurity. In this Undertaking I shall confine myself wholly to *Matters of Fact*; and therefore I shall not dispute the Authority of 13 Eliz. c. 1. which

makes it High Treason during the Queen's Life, and p. 185. Forfeiture of Goods and Chattels after her Death, to say, that an Act of Parliament is not of sufficient Force to limit and bind the Descent of the Crown; neither shall I in the least question the Power of Parliament to entail the Succession: These Matters are as much out of my Way; as they are above my Reach; and therefore I am very well contented, the Doctor should abound in his own Sense upon them. All that I shall here observe is, that whatever Power Kings, with their Parliaments, may have de Jure, upon such Occasions, it is however true in Fact, that no Act of Limitation could ever yet effectually exclude the next Heir by Proximity of Blood; but sooner or later, Providence has hitherto so ordered it, that those who were first in the Line of Descent, have at length gain'd the Crown, notwithstanding all Parliamentary Provisions to the Contrary. I believe it will be allowed, that we have no Laws extant of this Nature, before that of 7 Henry IV. 2. in which he settles the Succession on his Four Sons, and their Heirs, after his Decease; and it is observable, that as he was no better than King de Facto, so none but such stood in Need of any Acts of this Kind; for the Common Law provided sufficiently for the

the Succession of the Issue of Kings de Jure. The next Statute we hear of to this Purpose, is that of *Henry VI.* upon his Recovery of the Crown; in which he excludes *Edward IV.* (*Holinhead's Chronicle.*) and gives the Crown to the Duke of *Clarence*, and his Children, immediately upon the Failure of his own Line; but this had no long Continuance, being annull'd, (*Rot. Parl. 1 Edw. 4.*) as well as that of *Henry IV.* upon the Succession of the Right Heir. *Richard III.* is said to have appointed the Earl of *Lincoln*, his Sister's Son, his Successor; and *Henry VII.* was no sooner placed in the Throne, but he also procures an Act of Parliament, (*Rot. Parl. 1 Hen. 7.*) to secure the Inheritance to his Issue; but it is well known, his Son, by the Right of his Mother, had an undoubted Title, without the Assistance of his Father's Law. I come now to *Henry VIII's* Reign: This Prince having bastardized both his Daughters by Act of Parliament, (*28 Hen. 8. 7.*) found it necessary to make use of the same Authority, to render them capable of the Crown. In the Twenty Fifth Year therefore of his Reign, another

Act is passed, for the *Establishment of the King's*
 p. 186. *Succession*; in which the Descent of the Crown is expressly limited to his Two Daughters, *Mary*, and *Elizabeth*; and he is impower'd (as he had (*28 Hen. 8. 7.*) been before) to give, dispose, appoint, assign, declare, and limit, by his Gracious Letters Patent, under his Great Seal, or else by his Highness Last Will made in Writing, and sign'd with his most Gracious Hand, at his only Pleasure, from Time to Time hereafter, the Imperial Crown of this Realm (for Lack of Lawful Heirs of the Bodies of Prince Edward, and the Ladies Mary, and Elizabeth) to such Person or Persons in Remainder, or Reversion, as shall please his Highness, &c. Now the Controversy between Dr. *Higden* and me, upon this Occasion, is, whether King *Henry VIII.* did truly observe the Direction of this Statute in his Nomination of Successors, after the Decease of his Daughters. That he was impower'd to do this by his Last Will and Testament, is not denied; and that a Will of his was produced and executed in some Measure, is likewise not disputed; but however the Doctor is positive, (*Preface to his Defence.*) that *Henry VIII.* did not execute the Powers given him in Parliament, to nominate a Successor by his Last Will and Testament, sign'd with his own Hand. And in another Place, (*Defence p. 7.*) he affirms it with much Assurance; That there was indeed a Will drawn for that Purpose; but it was never sign'd by the King, as the Act of Parliament expressly required, &c. But I see no Reason for this Confidence; and I doubt not, when the Reader has

has well considered the following Proofs, and Arguments, he will allow, that the Authority of this *Will* is much better supported, than the Doctor is willing to believe. In order to this, I shall shew, *First*, That his *Will* was admitted, published, and executed as a Legal and Good *Will*. And, *Secondly*, That the Doctor has not produced any Objection of Weight enough to render its Validity questionable.

We are assured from the Journal of the House of Lords, that on the last Day of *January*, the *Commons* being sent for to attend the Lords, the Lord Chancellor then declared King *Henry VIII's* Death to both Houses, in *Full Parliament* assembled; and then a large Part of the said Deceased King's *Will* (particularly those Clauses of it, which related to the *Succession of the Crown*, p. 187. and the Administration of the Government, du-

during *Edward VI's* Minority) was read publicly before them, by Sir *William Paget* Secretary of State. Here then we see this *Will* is fairly laid before the Parliament, the best Judges of its Validity; and we do not find, that any Doubt arose in that Great Assembly concerning it. But on the contrary, we have the Authority of a celebrated Historian, (*Bishop of Sarum's Hist. Ref. Part 2. p. 4. B. 1.*) That all the Executors appointed by this *Will*, did resolve to execute it in all Points, and to take an Oath for their faithful Discharge of their Trust. And that the next Day the Executors did take their Oaths most solemnly, for their faithful executing the *Will*; that they order'd it also to be enrol'd, and every one of the Executors was to have an Exemplification of it under the Great Seal, — and out of Conscience to the King's *Will*, resolv'd to fulfil what he had intended, Now, if we consider, who these Executors were, and how eminent for their Integrity, as well as Quality; surely it will be hard to say, they wanted so much Judgment, as not to discern the Invalidity of this *Will*, or so much Virtue, as to execute what they knew to be a Forgery. But that I may not fail to give the utmost Satisfaction in this Question; I shall lay before the Reader some remarkable Extracts from an authentick Copy of the *Council Boals* of King *Edward VI.* (Part 1.) which will fully answer my Purpose.

' In the Name of *GOD, Amen*. Where it hath pleased our late Sovereign Lord and Maister King *Henry VIII.* of most Noble and Famous Memory, &c. by his Last Will and Testament bearing Date the 30th of *December*, in the 38th Year of his most Fortunate and Victorious Reign, to constitute and ordain us, the Archbishop of *Canterbury*, the

Lord *Wriothesly* Chancellour, *William* Lord *St. John*, *John*
 Lord *Russel*, *Edward* Earl of *Hertford*, *John* Viscount *Lisle*,
Cuthbert Bishop of *Duresme*, *Sir Anthony* Brown, *Sir William*
Paget, *Sir Edward* North, *Sir Edward* Montague, *Sir An-*
thony Denny, *Sir William* Herbert, Knights, to be his Exe-
 cutors, and to be of the Privy Council with our Sovereign
 Lord King *Edward VI.* until he shall be of the full Age of
 Eighteen, &c. We the said Archbishop, *Thomas* Lord
Wriothesly Chancellour, &c. being all assembled
 p. 188. together in the Tower of *London*, the last Day
 of *January*, in the 1st Year of the Reign of our
 said Sovereign Lord King *Edward VI.* that now is, have
 reverently and diligently consider'd the great Charge
 committed unto us; and calling to Almighty *GOD*, the
 only Giver of all Grace, for his Aid and Assistance in all
 our Proceedings, have fully resolv'd and agreed with one
 Voice and Consent, not only to stand to and maintain
 the said Last Will and Testament of our said Maister,
 and every Part and Article of the same, to the uttermost
 of our Power, Wits, and Cunnings; but also, that every
 of us present shall take a Corporal Oath upon a Book,
 for the more assured and effectual Accomplishment of the
 same. The First Day of *February*, being *Tuesday*, all the
 said Executors before written, assembled again together
 in the said Tower of *London*, and there herd the Will
 estones deliberately redde from the Beginning to the
 Ending. And concluding, with one Voice, to adhere
 and stick to their Performance of it, did first take their
 Oaths to the King's Majesty, and after immediately
 sware to the due and faithful Observation of the said
 Will, as the Day before they had resolved. *Wednesday*,
Feb. 2. Item, The Lord Protector and the rest of the
 Coexecutours then present, having the Last Will and
 Testament of our said late Sovereign Lord deceased,
 made Request with oon Voice unto the Lord Chancellour
 of *England*, to cause the same to be Recorded and En-
 rolled in Forme accustomed. And thereupon each of
 them to have Exemplification under the Great Seal of the
 same, for the doing whereof the said Will was presently de-
 liver'd by them to the said Chancellour. At *Westminster*, the
 24th of *February*; The Lord Protector and others his Co-
 executours being most desirous of their Part to see the
 Will of King *Henry VIII.* duly and hooly accomplished
 and fulfilled, as to their most bounden Duties apper-
 taineth: For their more certain and assured Proceeding
 in the Execution of the same, upon mature Deliberation
 resolved,

resolved, that before they would proceed, the whole
 Number of Judges, Barons of the *Exchequer*, the King's
 Serjeants, Attorney, and Solicitor shall deliberately
 peruse the whole Will, and frankly declare their Opinion,
 what the Executours may lawfully do, how and in what
 Form the said Will might be lawfully executed and per-
 formed. Whereupon all the said Judges, &c. being called
 into the *Exchequer-Chamber*, after the Opening of this
 Resolution to them, the said Will was redde from the Be-
 ginning to the Ending; And after the same was
 well debated among them, it was deliver'd into p. 189.
 their Hands to be farther consider'd accordingly:
 Who estsones assembling themselves together for that
 Purpose, and weighing the Will and every Part of it, as
 appertain'd, repair'd together to the Lord Protector, and
 other the Coexecutours; and then by the Mouth of Sir
Edward Montague declared, they had thoroughly consider'd
 the said Will, and with oon Consent and Advice deliver'd
 their Opinion, *how that Part of the Will then in question,*
might be executed, &c. On the 8th of March following, as
 an Instance of their great Care and Concern for this Will, the
 Lord Protector and Council thought convenient, that
 the Last Will of their late Sovereign Lord deceased, re-
 maining still in the Custody of the Earl of *Southampton*,
 should for the more safe keeping of the same, be bestowed
 in the Treasury of the *Exchequer*; and thereupon did give
 Order to the Lord Great Master, for sending for the same,
 which was done accordingly; Upon Receipt whereof, a-
 bout Ten of the Clock in the Forenoon, in a Case sealed,
 it was first opened, and estsones sealed, and appointed to
 be kept till the next Day; at which time it was order'd
 to be deliver'd into the said Treasury by the Hands of Sir
John Godsalve Knt. to the Custody of the Officers of the
 said *Exchequer*. Sign'd, *E. Somerset, T. Cant. W. St. John,*
J. Russell, J. Warwick, Antk. Brown, Ant. Denny, W. Herbert.
Wednesday the 9th of March. According to the former
 Order, this Day about Nine of the Clock in the Morning,
 the Last Will of our said late Sovereign Lord deceased,
 was deliver'd by the Hands of the Lord Protector, in
 presence of the rest of the Council, to Sir *John Godsalve*
 Knt. who repairing with the same to *Westminster*, and
 bestowing in the Place of the Treasury, where he al-
 ledged the Last Will of *Henry VII.* to remain, brought
 for Testification of the Delivery thereof, a Bill writ-
 ten in Parchment, subscribed with the Hands of *Thomas*
Daniel, William Walters, and John Lambe, Officers of the
 said

' said Exchequer.' These certainly are such Marks of Respect and Reverence, as could not possibly be paid to a Will, the Validity of which was in the least suspected.

In the Year 1549. King Edward VI. having been conveyed by the Duke of *Somerset* to *Windsor*, by Violence, as was pretended; the rest of the Privy Council, remaining in *London*, wrote a long Letter of Complaint to the King, against the said Protector; dated 19th p. 190. *October*; in which were the following Passages:

' We trust, that your Highness of your Goodness will, without any Jealousy or Suspicion, think that most expedient, both for your own most Royal Person, and all your Subjects, that by the Body of your Council may be thought expedient; to whom, and to no one Man, your Highness most grave Father appointed, by his Last Will and Testament, the Care of your Majesty, and all your most weighty Affairs. — For the End of this Matter touching the Duke of *Somerset*; if he have that Respect to your Majesty's Surety, that he pretendeth; if he have the Consideration of his Duty to GOD, that his Promise and Oath requireth; if he have that Remembrance of the Performance of your Majesty's Father's Will, that to the Office of a Good Executour appertaineth, &c.: Let him first suffer us to be restored to your Majesty's Presence, &c. — The Protectourship and Governance of your most Royal Person, was not granted him by your Father's Will; but only by Agreement, first amongst us the Executours, and after of others; Those Titles and special Trust was committed to him during your Majesty's Pleasure, and upon Condition he should do all things by the Advice of your Council, &c. Subscribed by the Lord Chancellor, the Lord Great Master, the Lord Privy Seal, the Lord Marquis of *Northampton*, the Lord Great Chamberlain, the Earl of *Shrewsbury*, the Earl of *Southampton*, the Lord *Wentworth*, Master Treasurer, the Master of the Horse, Master Vice-Chamberlain, Sir *John Gage*, Mr. Secretary *Petre*, Sir *Edward North* Lord Chief Justice, Sir *Ralph Sadler*, Sir *John Baker*, Sir *Edward Wotton*, Mr. Dr. *Wotton*, Sir *Richard Southwell*, Sir *Edmund Peckham*.'

In the 4th Year of this Reign *Stephen Gardiner* Bishop of *Winchester* was brought into Trouble for some Misdemeanours laid to his Charge; in which Prosecution the following Interrogatories (See first English Edit. of J. Fox's *Acts and Mon.* p. 793.) among many others, were put to the Lords of the Privy Council, &c. ' 1. Whether you know, or have heard say, that the late King of famous Memory,

Memory, willed him the said Bishop of *Winchester*, no
 more to be of the Privy Council with the King's Majesty
 our Sovereign Lord that now is; and omitted and expref-
 ly refused to have him named among other Councillours
 in his Testament, to be of the Council afore-
 said. 2. *Item*, Whether ye know or have heard p. 191.
 say, that the said Bishop, being aforenamed as
 an Executour in the Testament of the said late King, was
 a little before his Death, at his Declaring of his Last
 Will, put out by his Highness, and so by him refused to
 be any of his said Executors, &c.' To which Interroga-
 tories the Lord *Paget* answer'd as follows, (*J. Fox, ibid. p.*
815. 1st Edit.) ' Touching the late King's putting the Bi-
 shop of *Winchester* out of his Testament; it is true, that
 upon *St. Stephen's* Day at Night, four Years now past, his
 Majesty having been very Sick, and in some Peril, after
 his Recovery forthwith called for the Duke of *Somerset's*
 Grace, for the Lord Privy Seal, for my Lord of *Warwick*,
 for the late Master of the Horse, for Master *Denny*, for
 the Master of the Horse that now is, and for the said
 Lord *Paget*, at that Time his Secretary: And then willed
 Master *Denny* to fetch his Testament. Who bringeth
 forth first the Form of a Testament, which his Majesty
 liked not, after he heard, saying, that was not it, but
 there was another of a latter Making, written with the
 Hand of the late *Wriothesly* being Secretary. Which
 when Master *Denny* had fetched, and he heard it, he
 seem'd to marvaile, that some were left out unnamed in
 it, whom he said he meant to have in, and some in, whom
 he meant to have out; and so bad the said Lord *Paget*, in
 the Presence of the foresaid Lords, to put in some, that
 were not named before, and to put out the Bishop of
Winchester's Name, which was done. And then after his
 Pleasure declared in sundry Things, which he caused to
 be alter'd, and enter'd in the Will; his Majesty came to
 the naming of Councillours Assistants to his Executours.
 Whereupon the said Lord *Paget*, and the others, begin-
 ning to name my Lord Marquis of *Northampton*, my Lord
 of *Arundel*, and the rest of the Council, not before named
 as Executours; when it came to the Bishop of *Winchester*,
 he had put him out, saying he was a Wilful Man, and not
 mete to be about his Son, the King's Majesty that now
 is. Whereupon we passed over to the Bishop of *Westmin-*
ster, whom his Majesty had put out also; saying, he was
 scholed, or such like Term, by the Bishop of *Winchester*.
 And so passing unto the rest, he admitted all of Council

' without Stop, saving one other Man, at whom he made
 ' some Stick, but nevertheless upon our Suites relented;
 ' and so he was named as a Councillour. This all done,
 ' the said Lord *Paget* read over to his Majesty, what was
 ' written, and when he came to the Place of Councillours,
 ' reading their Names, he began to move the
 p. 192. ' King again for the Bishop of *Winchester*; and
 ' the rest then present set Foot in with him, and
 ' did earnestly sue to his Majesty for placing the said Bishop
 ' among the Councillours; but he would in no wise be en-
 ' treated, saying, he marvelled what we meant, and that
 ' all we knew him to be a Wilful Man.' The Duke of
Somerset likewise deposes, (J. Fox, *ibid.* 1st Ed. p. 819.)
 ' That *Henry VIII.* would not suffer the Bishop of *Winchester*
 to be named as Executour or Councillour in his Testament, tho'
 moved to it by *Sir Anthony Brown*, the Duke his Grace,
 the Earl of *Warwick*, the Lord *Privy Seal*, the Lord *Paget*,
Mr. Herbert, and other being present. The Earl of *Wiltshire*
 High-Treasurer of England, being examined, deposeth (J.
 Fox, *ibid.* p. 820.) That he was present at the Opening of the
 late King's Majesty's Will, and found not the Bishop of *Win-*
chester named there, either amongst the Executours, or Councel-
 lours. *Cuthbert* Bishop of *Duresme*, being examined, depo-
 seth, (J. Fox, *ibid.* p. 829.) That he did not know, that he him-
 self was named Executour, unto such time, that the King was
 dead: Nor did not know, that the Bishop of *Winchester* was
 left out, till he heard the Testament redde, after the King's Death.
 From which Passages it is observable, First, That the Will
 mention'd in these Depositions, in which the Bishop of *Win-*
chester's Name was omitted, was that very Will, which was
 executed as the Last Will of King *Henry VIII.* Secondly,
 That King *Henry VIII.* for above a Month before his
 Death, took great Care in settling this Will, in a very deli-
 berate manner; for it appears from the Lord *Paget*'s Depo-
 sitions, that he sent for that particular Copy of it, which
 he best liked; that it was read over to him, and several of
 his *Privy Council*; and that he then declared his Pleasure in
 sundry Things, which he caused to be alter'd, and enter'd into
 the Will; And lastly, that all these Alterations were read and
 approved of by him. But if after all, this Will was no better
 than a Forgery, how came *Stephen Gardiner* Bishop of *Win-*
chester, a Person of great Experience, Knowledge, and Sa-
 gacity, who was disgracefully excluded out of the Number
 of the Executours, and Councillors, and therefore would have
 been pleased with an Opportunity of invalidating the Will,
 if it was possible; how came that Bishop, I say, instead of
 urging

urging any Objections against its Authority, to presume to appeal to this very Will, against the Power exercised by the Duke of Somerset as Protector? Which yet it is very evident, he did? (See Fox's *Acts and Mon.* 1st. Eng. Edit. p. 795.) Lastly, When Archbishop *Cranmer* was earnestly solicited to subscribe to the Order of Succession appointed by *Edward VI.*, we are assured he refused to do it for some time, upon this only Reason; *viz. because he had sworn to Henry VIII's Will*; (*Strype's Memorial of Abp. Cranmer*) to which the rest of the Privy Council return'd no other Answer, but this; *That they had done the same, and had as tender Consciences as himself.* A good Proof, that neither the *Archbishop*, nor any other of the *Privy Council* knew, at that time, of any just Objection, that could be made against the *Will* of *Henry VIII*; for it is not to be imagined, such an Opportunity would have been neglected, of removing his *Grace's* Scruples, had it been then known, that the said *Will* was liable to any reasonable Exceptions. So that we have the fullest Evidence that can be desired, that during the whole Course of King *Edward's* Reign, this *Will* was esteemed of unquestionable Validity.

King *Edward's* Death was no sooner known to Queen *Mary*, but she claims the Crown, *as well by the Testament and Last Will of her dearest Father, as by Act of Parliament*: An Error she could not possibly have fallen into, had either her Friends, or her Enemies entertained the least Jealousy of her Father's *Will*. And the Truth is, if any Controversy ever arose upon this Subject; or it became a Matter of Doubt, in the Courts of Judicature or elsewhere, in any Time of this Reign, whether *Henry VIII's Will* was genuine and valid; our Memoirs and Histories are extremely defective, in concealing so important a Piece of Knowledge from us. We do not find indeed, that Queen *Elizabeth* did so much Honour to her Father's *Will*, as publickly to found her Right of Succession, in any Measure, upon it: But we are well assured, that some of her best and most knowing Subjects were of Opinion, that her Title from it deserved very well to be insisted on; which demonstrates, that the Authority of this *Will* was then thought very good and effectual. Bishop *Jewell's* Testimony, I believe, will be admitted, as credible for this Purpose; which may be found in his *View of a Seditious Bull*, (p. 13.) in the following Words: *Was not the Crown of England due to Queen Elizabeth by Inheritance, and by Succession, and by the Laws of this Realm? Did not her Father*
warrant

warrant it to her by Will, as to his Daughter? Did not Queen Mary, by express Words, leave it to her, as to her Sister? Did not the whole Nobility of the Realm confirm it? Did not Queen Mary's Bishops kneel down before her, and acknowledge her to be their Natural and Lawful Queen. &c. But notwithstanding all these Evidences, the Doctor tells us, that many and weighty Objections were long since made against this Will, which to him seem unanswerable. Let us now therefore consider these mighty Objections. It is not pretended, that any of these Objections appear'd publicly in Writing, till Queen Elizabeth's Reign; and even then, I believe, it will not be found, that any English Subject had the Confidence to give them Countenance. The Truth is, the Scotch Nation was highly offended with this Will, for Excluding the Issue of their Queen Margaret from the Succession to the Crown of England; and therefore, when they found the Right of the House of Suffolk openly asserted, which was done by one John Hale, in a particular Discourse written expressly for that Purpose in the Year 1563. they thought it then became their Zeal for the Interest of their Royal Family, to enquire into the Validity of Henry VIII's Will, upon which the opposite Title wholly depended: And the Issue was, that at length they fancied, they had made very happy Discoveries, which would be sufficient entirely to overthrow its Authority. What Arguments they thought proper to make use of upon this Occasion, they were very forward to publish; and we meet with them frequently in several printed Books of Queen Elizabeth's Reign, and therefore, I confess, it was Matter of some Surprize to me, to find so knowing an Historian as the Bishop of Salisbury, reciting the common

p. 195. Objections against this Will out of a Manuscript Letter, as a Secret, which he alone had the Happiness to discover, and which had been hitherto unknown. (*Hist. Reformat.* Part 1. B. 3. p. 349.) Whereas there is not one Circumstance in all that he has said upon this Occasion, but has been more fully urged in the English and Latin Editions of the Defence of Mary Queen of Scots, written by John Lesley Bishop of Ross, by the Jesuit Parsons in Leicester's Commonwealth, and his Conference about the Succession; (The English Edition was printed in 8vo. Anno. 1569, at London. The Latin was printed at Rheims in 4to. Anno 1581) not to mention John Colvill's Palinode, and another Pamphlet, entituled, *A Treatise declaring and confirming against all Objections, the Just Title and Right of the most excellent and worthy Prince K. James VI.* printed as I guess, not long before

before Queen *Elizabeth's* Death. These Books being thus published in that Queen's Reign, and dispersed throughout the Kingdom, are a sufficient Proof, that his Lordship had no Need to have Recourse to a Manuscript Letter, to furnish himself with Arguments against King *Henry's Will*. What these Arguments were, and how well they deserve that Name, I now proceed to examine : And though the Doctor has obliged me to consider them only, as they lie in *Leibington's* Letter, and Sir *Thomas Craig's* Book of the Right of Succession ; yet I shall be so just to his Cause, as to give them all the Advantage they are capable of.

1. It is suggested by *Leibington*, and Sir *Thomas Craig*, that this *Will of Henry VIII.* was not signed with his *own Hand*, but only with his *Stamp*, and therefore was not good in Law ; for the *Acts of Parliament*, which impower'd him to limit the Succession by his *Last Will and Testament*, obliged him to sign it with his *own Hand* ; which not being performed, the *Will* was of no Authority. To this I answer, *First*, That it cannot well be thought the Intention of those Acts of Parliament, to restrain the King from signing his *Will* with his *Stamp* : And, *2dly*, That the Law looks upon any thing that is signed with the King's *Stamp*, as of equal Authority with that which is signed with his *Hand*.

First, For from what Cause soever it might proceed, it is certain, that before the Passing of this q. 196. last Act of the Succession, the King generally made use of his *Stamp* upon all Occasions ; and whatever was thus signed, was universally receiv'd, and allowed to be effectual to all Intents and Purposes, as if the Letters of his Name had been particularly and expressly formed by his own Hand. I have seen the *Council-Books* of the 33d and 34th Years of his Reign, in which a great Number of Commissions and Warrants are mention'd to have had no other Authority, but his *Stamp* ; and it is well known, before that time he seldom gave himself the Trouble of using a Pen. It was undoubtedly more for his Ease and Satisfaction, to be left still to his Liberty of making use of his *Stamp*, as he had accustomed himself to do ; and we are well assured, his Parliaments had too much Complaisance for him, to cross him in any of his Inclinations. But *2dly*, The Law makes no Distinction between a *Will* signed with a *Stamp*, and the same Person's own Hand ; but looks upon the former as of equal Authority with the latter. This we are sure is true, in the Case of private Men ; and that it also holds good in the Question now before us, we have the Judgment of *Henry VIII's* last Parliament ; for the

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sion, by which the Duke of *Norfolk's* Attainder was passed, was sign'd only by the King's *Stamp*; and yet the Act of Parliament, which enabled the King to pass Acts by Commission, says expressly, *that it should be sign'd with his Hand*. This plainly shews, that whatever was sign'd by the King's *Stamp*, was, in the Opinion of that Parliament, signed with his Hand; and therefore the *Journal of Parliament*, when it mentions that Commission, says, it was signed *Signo manuali Regis*. It may indeed be suggested, that for this very Reason the Attainder of the Duke of *Norfolk* was reversed in the first Parliament of Queen *Mary's* Reign; viz. because the Commission, by which that Attainder was passed, was signed by the King's *Stamp*, and not his Hand (*Vide Journal Parl. 1mo Mariæ, and Bishop of Sarum's History of the Reformation, Part 2. p. 257. B. 2. and Dyer's Reports, Term.*

Mich. 1mo Mariæ.) remarkable Judgment given p. 197. in Parliament, which may justly be thought sufficient to determine this Controversy; and that was in the Case of the Act, which appointed the *Abjuration Oath*, and also the *Malt Tax*, (if I mistake not) which were both passed by a Commission signed only by King *William's* *Stamp*, the Day before he died. Will the Doctor now say, these Acts were of no Authority, and that whatever was done pursuant to them, was contrary to Law? I am persuaded, he will not own this to be his Opinion. 2. It is said this *Stamp* was not set to the *Will* by the King himself, nor by his Order; but *that after the King had lost the Use of his Reason, or was past Sense and Memory, one William Clark put the Stamp to it; which was acknowledged by the said Clark openly before Queen Mary and her Privy Council, and also the Parliament. And this was likewise attested in Parliament in Queen Mary's Time, for the Restitution of the Duke of Norfolk, by the Lord Paget.* This we find affirm'd in *Leithington's* Letter, and *Sir Thomas Craig's* Book of the Succession; and the Bishop of *Ross* is not only positive in these Points; but adds some farther Particulars in the Passage immediately following. 'We say then, that the King never signed the pretended Will with his own Hand; neither do we say it by bare Hearsay, or gather it by our former Conjectures and Presumptions only; but by good and able Witnesses, that avouch and justify of their own certain Knowledge, that the *Stamp* only was put to the said Will, and that even when the King himself was now dead or dying, and past all Remembrance. The Lord *Paget* being one of the Privy Council with Queen *Mary*, of his own free Will and godly Motion, for the Honour of the

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Realm, for Reverence of Truth and Justice, tho' in the
 Fact himself culpable, and in a manner thereto by great
 Authority forced; did first of all Men disclose the Mat-
 ter, first to the said Council, and then before the whole
 Parliament. Sir *Edward Montague* also, the Chief Justice,
 that was privy and present at the said Doings, did confess
 the same, as well before the Council, as before the Par-
 liament. Yea, *William Clark*, ascribed among other
 pretended Witnesses, confessed the Premises to be
 trewe, and that himself put the Stamp to the said
 Will, and afterward purchased his Charter of Pardon for
 the said Fact. Upon which Depositions well and
 advisedly weighed and ponder'd, Queen *Mary*, p. 198.
 with the Advise of her Council, to the Honour
 of GOD and the Realm, to the Maintenance of Trewth
 and Justice, and the Rightful Succession of the Crown, for
 the eschewing of many fowl Mischiefs, which might up-
 on this Forgery ensue, caused the Record of the said for-
 ged Will, remaining in the Chancery, to be cancelled,
 defaced, and abolished, as not worthy to remain among
 the trew and sincere Records of this noble Realm." And
 to the same Purpose writes the Author of the Treatise,
Declaring the Right and Title of King James VI. to the Crown
of England, before mention'd. Now it must be confes-
 sed, these *Facts* would be of great Weight, in putting an
 End to this Dispute, could they be well proved: But I shall
 shew, that some of them are false, and the rest depend up-
 on too slight an Authority to be credited. *First*, It is not
 true, that *Henry VIII.* was dead, or dying, or past *Sense* and
Memory, when the Stamp was set to his Will: For this was
 done on the Thirtieth of *December*, which was a full Month
 before he died; and it appears from the Lord *Paget's* De-
 position, (before cited) that there was no Part of this Will,
 which had not been duly and maturely consider'd by the
 King, while he had the perfect Use of his Understanding,
 Four Days before it was sign'd. *Secondly*, That the Stamp
 was set to this Will by one *William Clark*, without the King's
 Order, &c. is said without any manner of Proof by these
 Writers. And surely, in a Matter of this Consequence,
 they will not take it ill, if their bare Word is not admit-
 ted for Evidence. They tell us indeed, that my Lord *Paget*
 declared before the Council and Parliament, in the First
 of Queen *Mary*, upon the Occasion of the *Restitution* of the
 Duke of *Norfolk*, that the Stamp was set to this Will by
William Clark, &c. But what Evidence is there for this? We
 have neither Record, nor History, no printed Book or
 Manuscript,

Manuscript, besides what has been written by Gentlemen of the *Scotch* Nation, that affirms any thing of this Matter. What Occasion could my Lord *Paget* have, to mention the *Will* of *Henry VIII.* when the Duke of *Norfolk's* Attainder came under the Consideration of the Parliament?

What Relation had they one to another? Besides, p. 199. this Lord was the first, that produced this *Will*, and read it in open Parliament, as undoubted and genuine: He swore, as an Executor, to perform it; and all along acted in that Trust, as one that believed it of unquestionable Authority; and all this I have proved from uncontestable Records. Is it reasonable therefore to believe, that a Person of his Quality and Character, would have acted so base a Part? Does it any where appear, that he ever retracted his first Evidence? Or if he did, ought not a Matter of such Consequence to be as well attested, as what he had declared before in Favour of the *Will*? But nothing Satisfactory in this respect has yet been produced: Indeed the Adversaries to this *Will* have been bold enough to insist upon such a Retraction of the Lord *Paget*; and to expect, it should be admitted as an undoubted Matter of Fact: But the World is not yet so complaisant, as to give Credit to the bare Affirmations of a Party, supported by no plain and legal Proofs; and therefore till we are better assured of the Truth of their Assertions, we must beg Leave to look upon them as unworthy of any Regard or Countenance. Surely, such important Transactions, had they ever had an Existence, might have been demonstrated from some authentick Instruments, preserv'd among the publick Records; and it is not easy to imagine, that the *Journals* of Parliament, and Council-Books, should pass them by without any manner of Notice; and yet we know, that nothing of this Nature is to be found in those Writings. After all, if it could be proved, that the Lord *Paget* did give in the Evidence pretended, in Queen *Mary's* Time, it may very well be a Question, whether this could be of Weight enough to overthrow the Credit of his former Depositions, in Favour of the said *Will*: For the Bishop of *Rosse* himself confesses, *That if any such Witness, or Executor, had upon his Oath before a Lawful Judge, deposed, of his own certain Notice and Knowledge, that the said Will was signed with the King's own Hand; in case he should afterwards contrary and revoke this his solemnly Deposition, it ought not lightly to be discredited, for any such Contradiction afterwards happening.* But I have fully shewed, that this Lord

Paget

Paget did in King Edward VI's Reign, upon several publick Occasions, manifest his Belief, that *Henry VIII's Will* was good and genuine. What has been said against this imaginary Retraction of the Lord *Paget*, may equally serve, as an Answer to the Surmise, that *William Clark*, and the Lord Chief Justice *Montague*, did likewise appear as Witnesses against this *Will*: For all this is affirm'd without any manner of Proof; and is a Piece of History no where to be met with, but in those few *Scotch Writers* abovementioned; who were indeed truly worthy of Commendation, for the Fidelity and Zeal they shew'd in their Mistress's Cause; but were undoubtedly imposed upon in these Particulars. For surely it is a very dishonourable Reflexion on Sir *Edward Montague's* Memory, to say, he rejected the Authority of this *Will* in Queen *Mary's* Days, who was sworn to it in *Edward VI's*, and took Care to see it executed; and also upon a serious and deliberate Perusal of it, with the rest of the Judges, gave his Advice, how some particular Parts of it might best be performed, as I before observed out of King *Edward's* Council Book. After all, I am sensible, I have not yet satisfied Doctor *Higden*; for he tells us, (*Defence*, p. 9.) That what *Leitchington* says, carries the greater Weight; because he appeals for Truth of it, not only to Sir *William Cecill*, the Minister of State to whom he writes; but to several Noblemen then alive, who could not but know, whether what he affirms to have been done in open Parliament twelve Years before, was really done or not, &c. Admirable Reasoning! I doubt not but Sir *William Cecill*, and the Noblemen appeal'd to in that Letter, did know, whether what was affirm'd there was true; but certainly it was no Argument it was so, because *Leitchington* might easily have been confuted, if it had been otherwise: For surely Men may be confident in their Mistakes, and assert Things boldly against Truth, and yet be so despised, as to be thought unworthy of a Confutation. I am confident, this is the true Reason, that so little Notice has been hitherto publish'd, of the many notorious Falshoods, that fill almost every Page of the Reigns of King *Charles II.* and King *James II.* in the Third Volume of *The Complete History of England*: And yet, for fear that the establish'd Reputation of the Histories publish'd with it, in the First and Second Volumes of this Collection, and the Bulk of the Whole, consisting of three large Volumes in Folio, should gain it any Credit in the next Age, as much as it is despised in this; and what is now known to be wholly owing to the general

ral Contempt of the Book, should then by some Doctor *Higden* be improv'd into an Argument of its Authority; there is an *Examen Historicum* of it now preparing for the Press by a great Man, that had himself no inconsiderable Share in the Publick Affairs of the Time he writes of, and was an Eye-Witness of many of the Falshoods publish'd in this Third Volume of our *Complete Historian*. To return to Doctor *Higden*: How does he know, that Sir *William Cecil*, and other Noblemen appealed to, did not shew Secretary *Leithington* his Errors in the several Points insisted on in his Letter? I rather believe indeed, that they did not do him the Honour to undeceive him in those Particulars: For Queen *Elizabeth* and her Ministers thought it a Piece of Wisdom to conceal her Resolutions about her Successor; and therefore none about her were permitted to enter into Debates about the next Title after her Decease. But however that might have been, it is evident, that Secretary *Leithington* was misinformed in some Particulars, which he mentions in his Letter; for when *he leaves it to such, as are to claim after the Issue of Henry VII. to lay in Bar the Poligamy of Charles Brandon Duke of Suffolk*; I must take the Liberty to charge him with a scandalous and unpardonable Defamation of that Noble Peer: That this Duke of *Suffolk* had another Wife living at the Time of his Marriage with *Henry VIII's* Sister, was indeed a Calumny too much credited by the Friends of the *Stuart* Family, in the Beginning of Queen *Elizabeth's* Reign; but so groundless and so easily confuted, that the World was soon convinced

of their Error, in giving it any Countenance; in p. 202. so much that when the Bishop of *Rosse* wrote his *Defence of Mary Queen of Scots and her Title*, he was ashamed of so notorious a Falshood, and therefore refused to allow it any Place among his Objections against the House of *Suffolk*; which, had the Story been true, would have been of great Use and Service to him. Nor was this Slander ever after revived by any Writer of Queen *Elizabeth's* Reign, till Father *Parsons* the Jesuit publish'd *Leicester's Commonwealth*, and his *History of the Succession*; in which Piece, he thought it became him to omit none of those scandalous Aspersions, which might help to create an Aversion to the Families of *Scotland* and *Suffolk*, that he might the better advance the Interest of the Court of *Spain*. In our Days indeed an eminent Writer has very surprizingly, by an unfortunate Slip of his Pen, rescued this Calumny from Oblivion, and given it a fresh Currency in his celebrated History. I have seen it often affirm'd (says this great

Author

Author the Bp. of *Sarum's*, Hist. of the Reform. Part. 2. p. 176.) in many Letters and Writings of that Time, that all the Issue of Charles Brandon was illegitimated, since he was certainly married to one Mortimer, before he married the Queen of France; which Mortimer lived long after his Marriage to that Queen; so that all her Children were Bastards. Some say he was divorced from his Marriage to Mortimer; but that is not clear to me. I know not how it came to pass, that his Lordship's usual Tenderness for the Honour of *Henry VIII.* did not a little restrain him from so readily giving his Assent to so suspicious a Piece of History; for undoubtedly it may be reckon'd among the great Blemishes of his Reign, that he match'd his Sister to a Person, who had a Wife then living. Besides, had his Lordship been at Leisure to reflect thoroughly upon this Passage, before it fell from his Pen, he would have found it difficult to believe, so remarkable an Occurrence could have been, either a Secret to all our *English* Writers, or omitted by them. And, Lastly, It is Pity his Lordship did not consider, how many * Noble Families are injured, if what he has affirm'd should prove untrue; for it is not to be imagin'd, they should * p. 203. be insensible of the Honour of deriving a Legitimate Descent from the Sister of so great a King. I proceed

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* It may not be unacceptable to the Reader to be informed, who the principal Noblemen are, who have the Honour to be descended from the Duke of Suffolk, and the French Queen; and therefore I shall here set down their Names in their Order, as they occur to my Memory. The first of this House of Suffolk, now living, is the Lord Bruce (Son to the Earl of Ailesbury) and his Sister the Countess of Cardigan; then follow the late Earl of Winchelsea's Sister, the Right Honourable Heneage, the present Earl of Winchelsea; all the Issue of the Lady Frances, late Viscountess Weymouth; the Earl of Burlington, and the Issue of his Father and Grandfather; the Children of the late Duchess of Queensborough, and the present Duke of Somerset. All these are lineally descended from Charles Brandon Duke of Suffolk, and the French Queen, by their eldest Daughter Katharine. And it is also well known, that the Earls of Derby, for several Successions, reckon'd it as one of the noblest Instances of their High Extraction, that they sprung from the Lady Eleonore, youngest Daughter to the foremention'd Duke and Queen. So that the several Branches descended from them, would be too numerous to be easily called to Mind.

ceed now to shew, that I have not without Justice question'd this Part of his Lordship's History; which will be done effectually by the following Extract out of a Manuscript Discourse written by Mr. *John Hale*, in the Year 1563.

' Against these Heirs of the *French* Queen it is objected, ' that they were not lawfully born; but verily this is a ' mere Slaunder, growen altogether upon Malice, and no ' Accusation made upon any just Presumption. For I beseech you tell me, is it like, or can any reasonable Man think, that if Duke *Charles* had had another Wife living, ' when he married the *French* Queen; that King *Henry* ' would have consented, that his Sister should have receiv'd so great Injury, that she should have been kept like a Concubine? Would his Council have suffered so great an Infamy to have come to his Majesty's Stock? Or would the Nobility of the Realme with such Triumph have honoured so unlawfull an Act? Wou'd the Common People, who many times be ready to speak Evill of Well-doing, have holden their Tongues in so manifested Adultery? Is it like, that in so long time, that the *French* Queen and the Duke lived together as Man and Wife, (that was all the Life of the *French* Queen) she should not have heard of it? Was it possible, that amongst so many Women, which dayly resorted to her, none would have told her of it? Or is it to be believed, that she, contrary to the Nature of all other Women, would have been contented, that another should have been Partaker of that Flesh, which she according to GOD's Word took only to be her own? Or can any Man think, that any Woman can be contented to live in mean Degree.

p. 204. ' gree, when she may be a Dutcheess, as the Lady *Mortimer* might have been justly, if she had been the Duke's Wife? Surely there is no Reason to make any Man to think so; then much less to report so. But suppose, that the Duke had had another Wife living, at that time he marryed the *French* Queen; yet forasmuch as He and She were marryed together openly, continued all their Lives as Man and Wife together, and nothing said against them; and every Man took them for Man and Wife; and that the Lady *Frances*, and the Lady *Eleanor* were not taken to be Bastards during their Lives: Now alter their Death neyther they nor their Children may, by the Laws of this Realme, be accounted so. *Nec justum aliquando mortuum facere Bastardum, qui toto tempore suo tenebatur pro legitimo*, as appeareth by a Judgment given at *Westminster* in 13^o *Edw* 3^{ti}j. But for the Declaration

Declaration of the Truth of this Matter, and to putt out of the Heads of the People this fond Opinion and Talk, which is only moved of Malice, and cometh not of any certain Knowledge; and encreased by light Credit without Consideration; and mayntained by such as no doubt pass so much upon the Trueth, as desirous to satisfie their froward Affections.

You shall understand, that the Duke of *Suffolk*, *Charles Brandon*, being in the Court, living sole and unmarried, made a Contract of Matrimony with one *Mrs. Ann Browne*. But before any Solemnization of Marriage, not only had a Daughter by her, (which after was marryed to the Lord *Powis*) but also brooke Promise with her, and openly and solemnly marryed with the Lady *Mortimer*; which Marriage the same *Mrs. Ann Browne* judicially accused to be unlawfull; for that the said Sir *Charles Brandon* had not only made a Præcontract with her, but also had carnally known her. Which things being duly proved, and Sentence of Divorce, between the said Sir *Charles* and the Lady *Mortimer*, given and denounced, he marryed solemnly the said *Mrs. Ann Browne*: At the which Marriage all the Nobility were present, and did honour it. And afterwards the said Sir *Charles* had by the same *Mrs. Ann Browne*, another Daughter, which was marryed to the Lord *Mounteagle*. After this, the said *Mrs. Ann Browne* continewed with him all her Life as his Wife, and dyed his Wife without any Impeachment of the Marryadge. After whose Death, King *Henry* having him in great Favour, intended he should for his better Preferment have marryed the Lady *Lisle*, being a young Mayd, an Inheritour. Whereupon the said Sir *Charles* was created Viscount *Lisle*: But that Marriage by reason of her Youth took no Place. After this he was created Duke of *Suffolk*, about the which Time *Lewis* the French King dyed; and leavyng the said Lady *Mary* (Daughter to King *Henry VII.*) Widow; the sayd *Charles* Duke of *Suffolk* was sent into *France* for her, and with the Consent of *Henry VIII.* marryed her twice, first secretly in *France*, and after openly here in *England*, (as before is declared) and so they lived together all their Lives long as Man and Wife, and were so accepted and taken of all Parts, and no Person impugning or gainsaying of the same; for there was no just Cause. After this they had Issue between them; that is, the Lady *Frances*, and the Lady *Eliane*. Against whom the Lady *Powes*, their Base Sister, in the Time of King *Edward VI.* alleged Bastardy; but yet notwithstanding

' withstanding that, they were both by the Laws of the
 ' Realme, and by the Canon Laws declared to be legitimate,
 ' and approved to be born in Lawfull Matrimony, so as
 ' no Man can say, they be Bastards. And if that they could,
 ' yet at this present, because it was adjudged for them,
 ' that it was not so; and also for that they both be dead,
 ' and dyed taken as Legitimate; he ought not to be heard
 ' by Order of any Law in the World, if he would object it
 ' against them." Thus did this Gentleman long since
 wipe off the Aspersions cast upon the Issue of *Charles Brandon*,
 and the *French Queen*; to which it does not appear,
 that any Reply was ever made; and it certainly had that
 Effect, that the Bishop of *Rosse*, and others the most Learned
 Assertors of the Title of the House of *Scotland*, never
 afterwards thought fit to urge this Objection. *Leithington*
 indeed, and *Parsons* have had so little Modesty, as to repeat
 this Calumny, at the same time that they confess, they had
 seen this Discourse of Mr. *Hales*; but neither of them has
 pretended to shew, that he had mis-represented the Fact.
 It may be farther observed, that *Henry VIII.* expressly pro-
 vides in his *Will*, that the Heirs of the Lady *Frances* and
Eleanor (to whom the Crown was to descend after his
 Daughter *Elizabeth*) should be lawfully begotten; a Qualifi-
 cation, which therefore he may be supposed to have believ'd,
 was not wanting in their Mothers. But if any should be so
 contentious, as to disallow of this Consequence;
 p. 206. or so difficult to please, as still to question, whe-
 ther the Legitimacy of the Children of the Duke
 of *Suffolk*, and the *French Queen*, is sufficiently proved;
 they may enjoy their Humour, without any real Prejudice
 to the Issue of the Lady *Frances* and *Eleanor*, who had un-
 doubtedly a good Title by this *Will*, whatever the Birth of
 their Mothers might have been. Another Objection against
 this *Will* is, That the Original had been embezzled and was not to
 be found. This is urged by *Leithington*; and the Bishop of
Rosse frequently challenges the Advocates of the House of
Suffolk to produce it; and even Mr. *Hales* himself was of
 that Opinion, that it was destroyed in Queen *Mary's* Time,
 by the Enemies of the Protestant Religion. But they were
 all extremely mistaken; for the Original *Will* is still extant,
 and may be seen in the Chapter-House at *Westminster*: It was
 first indeed repositied, by Order of Council, in the Treasury
 of the Exchequer; (See before p. 189.) where it continued
 till about 18 Years ago it was removed, with the rest of
 the Records, &c. into the Place, where they now lie, as
 a more proper Repository for them. In a word, this Ori-
 ginal

ginal Will has been often seen and perused by able Judges, by whom I have been assured, that the Letters of the *King's Name* are evidently formed by a Pen, and therefore strictly and properly by *his Hand*, and not by his *Stamp*: They have likewise observed, that some of the Strokes of the Letters are plainly uneven, as drawn by a weak and trembling Hand, in the Time of his Sickness; and are manifestly distinguishable from those made by his *Stamp*, which is presently discerned at the first View. I will not presume to undertake for the Exactness of this Account, though I have good Reason to rely upon it; but if the Reader has any Scruples, he may easily satisfy his Curiosity, by comparing the *King's Name*, as it is at the Head of this *Will*, with his Stamps; many whereof may be met with in the *Cotton*, and other Libraries about the Town. From whence it is evident, how little the Court of Queen *Elizabeth* troubled themselves about the Dispute concerning the *Right of Succession* in the House of *Suffolk*, since they suffer'd such Mistakes to pass upon the People, without the least Contradiction, when it was in their Power to rectify them at their Pleasure. Again, we are told by the Adversaries to this *Will*, that the Witnesses to it were of no Quality or Fortune; and therefore not like to be made use of by a Prince upon such an Occasion: And they add, that it is no small Prejudice against it, that it was never proved in the *Spiritual Court*. But these are vain and frivolous Objections; for of those that signed as Witnesses, the first was a Knight, three others were the King's Physicians, and the rest, Gentlemen that had good Employments about the Court; and therefore he gives each of them such Legacies in his *Will*, as in those Days were not thought inconsiderable. As for the *Probate* of the *Will*, whether or no it was performed according to the usual Forms in the *Spiritual Courts*, is a Point of no Moment, and not worth enquiring after. It is enough, that it was laid before both *Houses of Parliament*, and that the Executors advised with the Judges, and other able Lawyers, about it; who gave their Opinions, how it might be best executed, as a good and valid *Will*. Besides, this we are assured, that the Council required the *Lord Chancellor* to cause it to be recorded; and enrolled in Form accustomed; and therefore if any will still insist upon it, that it ought to have been proved in the *Spiritual Courts*; it will be expected, they should give an Instance of any *Royal Will*, that was ever subjected to those common Forms. Lastly, It is objected, that the Earl of *Hertford*, and Lady

Katherine Grey, (eldest Daughter to the Duke of *Suffolk*) being required to prove their Marriage in the Beginning of *Queen Elizabeth's* Reign (*Camden. Annal. Eliz. A. D. 1562.*) and a certain Time being limited, within which they were obliged to produce their Witnesses, they were not able to do it; and therefore the Archbishop of *Canterbury* proceeded to a definitive Sentence, whereby the pretended Marriage was declared null and void; and consequently the Title from this Lady (who was first in Descent from *Cha. Brandon* and the *Fr. Queen*) was entirely defeated. But this Objection does not affect the *Derby* Family, which derives it self from the Lady *Eleanor*, the youngest Sister.

Besides, Sir *Wm. Dugdale* assures us, *That the Validity* p. 208. *of the Earl of Hertford's Marriage was afterwards brought to a Tryal at the Common Law; when the Minister, who married them, being present, and other Circumstances agreeing, the Jury (whereof John Digby of Colshil in the County of Warwick, Esq; was the Fore-Man) found it a good Marriage.*

Thus I have consider'd all the material Objections against the Validity of *Henry VIII's Will*; and, if I am not too partial to my Performance, I shall never be put to the Trouble of a farther Vindication of it. But for the Reader's greater Satisfaction, I have inserted in the *Appendix* to this Discourse, a genuine Copy of this *Original Will*, and also *Mr. J. Hale's Defence of the House of Suffolk*; by the Perusal of which he may be more fully instructed in this Controversy. I shall only now add, that as much as this Exclusion of the *Scotch Line* has been exclaimed against, there was a politick Reason for it, which will justify *Henry VIII.* in the Opinion of many Persons; and that was, because the Regency of *Scotland* had refused to marry their young *Queen* to *Prince Edward*, according to the Agreement made for that Purpose. This Refusal was so much resented by *Henry VIII.* that it undoubtedly occasioned this Limitation of the Succession in his *Will*; not only for a Punishment for their Noncompliance, but rather as an Inducement to them to consent to this Marriage; since otherwise there was no Hopes of obtaining the Crown of *England*: And it may likewise be observed, that by their Obstinate Rejecting all Overtures for this Marriage, the *Scotch* drew upon themselves that bloody War, which was successfully managed against them in the Beginning of *Edward VI's* Reign, under the Conduct of the Duke of *Somerset*; for in his Declaration this is assigned as the chief, and only Reason of it,

The Validity of *Hen. VIII's Will* being once established, it will inevitably follow, that *K. Jam. I.* ascended the Throne of *England* directly contrary to the Order of Succession appointed by several *Acts of Parliament*; and yet in the Act, which recognized him, it is expressly said, *That immediately upon the Dissolution and Decease of Elizabeth late Q. of England, the Imperial Crown of England, &c. did by Inherent Birthright, and Lawful and Undoubted Succession, descend and come to the said K. James, &c.* so that, tho' it is in Fact true, that several Limitations of the Succession have been made in Parliament; and Persons who were intitled to the Crown by Primogeniture and Blood, have thereby been excluded; yet it is also evident, that no Precedents have hitherto been met with, of *Parliamentary Entails*, that have long prevailed against those, that claimed by *Common Law*. And it is not a little remarkable, that tho' Queen *Elizabeth* thought fit to make it *High Treason for any one, during her Life, to affirm, that she and her Two Houses of Parliament could not make Laws of sufficient Force and Validity to bind the Descent and Inheritance of the Crown*; (13 Eliz. c. 1.) yet this very Queen, whose Wisdom is so justly esteemed Abroad, and admired at Home; whose Memory is so deservedly precious among all true *Englishmen*; and whose Example will be always looked upon as worthy of Imitation by her greatest Successors: This glorious Princess, I say, who knew very well how the Succession was settled by her Father's *Will*, thought it no Blemish to her Honour, to discourage all the *Pretenders* of the House of *Sussex*, throughout the whole Course of her Reign; and at last entirely defeated all their Hopes and Imaginations, by placing the *Stuart* Family upon the Throne. I speak not this out of a Design of commending her for any Violations of the Laws of her Country, which should always be esteemed Sacred by Princes themselves; and tho' perhaps she never had the Interest of her Kingdom more at Heart, than in this particular Action; yet I shall never pretend to defend her, if those who are proper Judges in this Matter, shall think her chargeable with Injustice. I had before promised, that my Business was only to enquire into *Matter of Fact* in the present Point of Controversy, without any Regard to the Question of *Right*; and in Pursuance of this Purpose, I have now brought down my Enquiries to the Reign of King *James I.* and made it evident that he succeeded contrary to several Acts of Parliament, by which he was expressly excluded. I have farther observed, that his Accession to the Throne was

p. 210.

diously promoted, and at last effected by Queen Elizabeth her self and her Council; and therefore I do not pretend to acquit her of a manifest Contempt of those *Acts of Parliament* from which her Sister and she, in some Measure, derived their Right to the Crown. It may be now expected, since I have arraigned the Memory of Queen Elizabeth, for acting contrary to a *Parliamentary Entail*, that I should make good my Accusation by good Authority, and that I shall now attempt to do. Soon after her Possession of the Crown, she came to this Resolution with the Scotch Ambassador, that if his Queen would abstain from using the *English Arms and Titles*, during the Life of Queen Elizabeth, she would oblige her self and her Children to do nothing in Prejudice of the Queen of Scots Succession: (*In the Year 1561. Spotwood's Hist. of the Church of Scotland, p. 182.*) And when Maitland, the Scotch Ambassador, pressed her to declare his Mistress her next Successor, she made Answer, *That his Queen might assuredly expect at her Hands, that she would never wrong her nor her Cause, if it were just in the least Point: And then she added, I take GOD to witness, who beareth this Conference, that next my self, I know not any one, whom I would prefer to her, or who (if the Title should fall to be controverted) might exclude her.* These were early Significations of her Good-Will towards the Scotch Family, in the Beginning of her Reign; and, on the other side, she was so far from giving any Countenance to the Pretensions of the House of Suffolk, that Mr. Hale was imprisoned (*Camden's Eliz. A. D. 1564.*) for presuming to write a Defence of their Title, and Sir Nicholas Bacon, Lord Keeper, who was supposed to have assisted him in it, was long out of Favour upon that Account. Soon after, Mr. Thornton, Law-Reader of *Lincolns-Inn* was order'd into Custody for arguing against the Right of the Scotch Queen. (*Camden's Eliz. A. D. 1564.*) And within a short Space of Time, finding the Party for the House of Suffolk were very busy, and bold in asserting the Claim of that Family; she permitted the Bishop of *Rosse* to publish his Vindication of the Rights of his Queen; in which he is said to have been assisted by Sir Anthony Brown, Chief Justice of the *Common-Pleas*, and one Caryll an eminent Lawyer. 'Tis true, she took Care to let King James know, that while he continued of the *Popish* Persuasion, he must not hope for her Friendship; and even his Mother, as violent a *Papist* as she was, knew so well the Aversion, which the Court of *England* had against her Religion, that she never thought it advisable in any of her

Letters

Letters to her Son, to dissuade him from persevering in the Protestant Profession; and when she was laying her Head upon the Block, she sent this last Message to him; *That altho' she was of another Religion, than that wherein he was brought up, yet she would not press him to change, except his Conscience forced him to it; not doubting, but if he lead a good Life, and were careful to do Justice, and govern well, he would be in a good Case in his own Religion.* In Compliance therefore with the wholesome Counsels of his best Friends, he at length declared himself openly against the Church of Rome; and thereby gained entirely Queen Elizabeth's Affections, who before had dispensed her Favours to him but sparingly, and with great Reserves. But as soon as she was assured, that his Sentiments in Religion became conformable to her own; she was not wanting in all proper Encouragements to him, to look upon the Succession as effectually secured to him after her Decease: And it is not a little remarkable, that her Chief Ministers, who had been most active in bringing the Mother to the Scaffold, were not afraid to continue their utmost Endeavours to bring the Son to the Throne; so much more powerful was their Concern for the Interest and Welfare of their Country, than their Regards to their own private Safety and Advantage. King James therefore having now laid so good a Foundation, was no longer in Danger of a Disappointment; so that when Queen Elizabeth lay a dying, Mr. Camden assures us (*Ann. Eliz. A. D. 1603.*) He was the only Person thought of for her Successor; to whom the Heads of all Parties immediately paid their Compliments, as the Prince p. 212. whom the Queen always justly and heartily favoured.

And both he and Archbishop Spotswood relate it, as a certain Truth, that she declared him her Successor, before the Archbishop of Canterbury, and the Lord Admiral, with her last and dying Breath. And no sooner had she expired, but her Privy Council dispatched a Letter to King James, to acquaint him with it; in which they declare his undoubted Right, and promise to serve him with the utmost Fidelity; and the same Morning Care was taken to proclaim him King. Thus was King James at length placed upon the Throne of England, in Opposition to the several Acts of Settlement made against him; and thus was Henry VIII. disappointed in his Endeavours to exclude the Scotch Family. I shall conclude this Head with the following Reflection of Sir Walter Raleigh, in his Preface to the History of the World. As for Henry VIII. what Laws and Wills did he devise to establish this Kingdom in his own Issues? Using his sharpest Weapons to cut off and cut down those Branches, which sprang

sprang from the same Root that himself did. And in the End (notwithstanding these his so many irreligious Provisions) it pleased God to take away all his own without Increase.

The Doctor's last Effort to prove the Authority of Parliamentary Entails, is from the Succession of Queen Mary and Elizabeth: The first of which, he says, claim'd the Crown chiefly by Virtue of the 35 Henry VIII. and she or Queen Elizabeth cou'd have no other Title to it. Both of them could not have a Title by Birth; and yet both successively ascended the Throne by this Act of Settlement. Both had been declared by Law illegitimate, in the 28 of Henry VIII. and one of them was not of Legitimate Birth; and therefore could have no other Title to the Throne, but what this Act gave her. And soon after,

the Doctor again assures us, That Queen Mary P. 213. or Queen Elizabeth was certainly illegitimate, and therefore could have no other, but a Parliamentary Title to the Crown; and yet it is certain, that Queen Mary was brought to the Throne chiefly by the Assistance of her Protestant Subjects, who yet generally did not believe her of Legitimate Birth; and Queen Elizabeth was proclaimed by the Authority of a Popish Parliament, who is generally believ'd her illegitimate. Which shews, that both Protestants and Papists agreed in maintaining the Act of Succession, that was made the 35 of K. Hen.

VIII. and consequently both believed the Descent of the Crown of England was limitable by Act of Parliament. I have here again the Misfortune to dissent from the Doctor in most of the Propositions contain'd in these Passages. And first of all, I cannot agree with him, that these Queens could have no other Title than the 35 Henry VIII. for the Acts of Parliament teach us otherwise, when they tell us, That the Imperial Crown descended to Queen Mary; (1 Mar. 1.) and that Queen Elizabeth was rightly, and lineally, and lawfully descended from the Blood Royal of England: (1 Eliz. 3.) If these Ladies did not insist upon their Birth among their other Claims, they might have good Reasons for that Omission; but surely the Dr. will not from thence infer, that they did not think themselves Legitimate. That they were both bastardi'd by Act of Parliament is certain; but if that proves any thing, it is more than the Doctor seems willing it should: For it will then follow, that neither of them had a Title by Birth; whereas he does not dispute, but one of them might be Legitimate; tho' he does not determine, which it was. But why might they not both be Legitimate? Let us a little enquire into the Reasons, upon which such an Assertion must be founded. The Marriage between King Henry VIII. and Queen Katharine was declared Null and Void

Void by the proper Courts of Judicature, and the supreme Authority of the Kingdom; therefore it is said, their Issue must needs be *Illegitimate*: But the *Canonists* utterly deny this Consequence: for they unanimously affirm, *that Marriage contracted bona fide (notwithstanding p. 214: any Impediment, which may afterwards be discovered) is sufficient to render the Children Legitimate*; so that according to the Rules of that Law, Queen Mary must be looked upon as *lawfully born*; for the *Matrimony of her Parents was contracted, solemnized, and consummated by the mutual Agreement and Assent of them both; by the Counsel and Advice of the most wise and gravest Men of both their Realms; by the deliberate and mature Consideration and Consent of the best and most notable Men in Learning, in those Days, of Christendom: (1 Mar. xi.)* And no Doubt or Scruple arose concerning the Lawfulness of this Marriage, till Twenty Years after, that is till many Years after the Birth of Queen Mary. And now, lest the Doctor should suspect me to be guilty of Partiality to a *Popish Queen*; or that I have advanced an Opinion never before approved of by any Learned *Protestants*; the following Authorities will, I doubt not, be sufficient for my Justification.

Bishop Godwin (*Life of Queen Mary, p. 157. Fol.*) lays it down as a *Rule of the Christians, That Matrimony contracted without any conceived Impediment (altho' it after chance to be dissolved as unlawful) is of such Force, that the Children begotten in such Wedlock are to be accounted Lawful*; and then he adds, *if this Rule be admitted as true, Queen Mary was legitimately born.* In the late Reign of King James II Dr. William Clagett, Preacher of Grays-Inn, publish'd an Answer to a *Popish Pamphlet, entituled, T. W's Queries concerning the English Reformation.* Among which the following Query is observable. *If Mary was Legitimate Heiress of the Kingdom; then Elizabeth was not, &c.* This had been a *Popish Dilemma*, till of late Days; but now it seems the Doctor thinks it may do good *Protestant Service*; but I would intreat him to take Notice of Dr. Clagett's Answer; *The Legitimacy of Elizabeth (says he) is plain, supposing the Marriage of Queen Katharine to King Henry to be void; but yet Mary, the Child of that Marriage, was not Illegitimate; because the Marriage was made without Fraud.* Lastly, The present Bishop of Salisbury's Opinion may possibly be thought of greatest Weight; I shall therefore here set it down for the Reader's Perusal. It will be found in his *Reflexions on the Oxford Theses, relating to the English Reformation, (an-* p. 215.

other

other *Papish Pamphlet*) in answer to an Objection against Queen *Elizabeth's* Legitimacy. His Words are these, (*Part 2. p. 31.*) ' But in the last place it is to be consider'd, ' that here was an innocent Child in the Case, whose Legitimacy and Right could not be cut off by her Mother's ' extorted Confession: Infants are more particularly under ' the Protection of the Law; and therefore Acts passed ' against them in that State of Feebleness, have such Flaws ' in them, that they have always a Right to reverse them; ' so a single Witness, in such Circumstances as her Mother's ' were, could not be sufficient to disgrace and disinherit ' her; and the Confirmation of the Act of Parliament ' that followed afterwards, might have been a forcible ' Bar in Law to her; but could be no just one; for as a ' Bastard is still a Bastard, even tho' he were Legitimated ' by Act of Parliament, so a Lawful Child is still what 'tis, ' notwithstanding a Sentence of Bastardy confirmed in Parliament: And this is so true, and was so evidently the Practice of that Time, that even King *Henry*, in his Suit of ' Divorce with Queen *Katherine*, was willing to have his ' Daughter *Mary* declared Legitimate; because Children begat in a Marriage, are begotten *bona fide*; and so they ' ought not to suffer, because of the secret Fault of their ' Parents. And if this was yielded in Marriage, where ' both Parents were, according to the King's Pretensions, ' guilty of Incest; it was much more just in this Case of ' *Ann Bullen*, even supposing her Precontract true; for her ' secret Fault ought not to blemish nor ruin her innocent ' Child. Another Instance that fell out at this time in the ' Royal Family, is very considerable; and because it is little ' known, I fancy the Reader will not be displeased to have ' it particularly open'd to him. *Henry VIII's* Sister, that ' was Queen of *Scotland*, did after her Husband King *James IV's* Death, marry the Earl of *Angus*; and by that Marriage she had a Daughter, Lady *Margaret Douglas*. Some ' time after her Marriage she fell to be in ill Terms with ' her Husband, and discover'd a Precontract he had given ' to another; and upon this she sued him in the Spiritual ' Court; and it being proved, the Marriage was annulled; ' but her Daughter was still held to be Legitimated; and ' was entertain'd by King *Henry*, as his Niece, and given ' by him in Marriage to the Earl of *Lenox*; of whom descended the Lord *Darnly*, that was King *James I.* of *England's* Father; and since he was consider'd to be the second Person in the Succession to the Crown ' of *England*, after the Queen of *Scots*, this shews, p. 216. ' that by the Practice of that Time, a Precon-

' tract even legally proved, yet did not illegitimate the Issue, that were begotten *bona fide* by one of the Parents.' Thus we see that *Protestants*, as well as *Papists*, have asserted the *Legitimacy* of *Queen Mary*, notwithstanding the Nullity of her *Mother's* Marriage, and the *Act of Parliament* which declared her a *Bastard*: And if the Doctor should now wonder, how they could presume to entertain an Opinion so contrary to Law; all that I can say for them is, that they believed it to be an unjust Law, and therefore of no Force, as contradictory to the common Principles of Justice and Equity, by which the Christian World has been govern'd for several Ages. And the Doctor may be pleas'd to take Notice, this was Bishop *Jewell's* Opinion too; for in the Place before cited, (*viz.* His *View of a Seditious Bull.* p. 13.) he says expressly, that *the Crown of England was due to Queen Elizabeth by Inheritance, and by Succession.*

I must now follow the Doctor to his *Chapter of Authorities*, in which he pretends to support his Opinion by that of our *best Modern Lawyers*. The Passages cited by him out of the three first, *viz.* the *Lord Chancellor Bacon*, the *Lord Chief Justice Coke*, and the *Lord Keeper Bridgman* have already received an Answer in the former Part of this Discourse, to which I refer my Reader; but for this farther Satisfaction I shall now shew him, that the two first of these great Authors are plainly against the Doctor in other Parts of their Writings. It is a known p. 217. Position of Doctor *Higden's*, and evidently maintain'd throughout those his Books, with which I am now concerned, that *whosoever is King de Facto, is at the same time King de Jure*; whereby that usual Distinction is entirely laid aside, as destitute of any Foundation from the Laws of *England*. But my *Lord Chancellor Bacon* is clearly of another Mind; for he says, that *Richard III. was King in Fact only, but Tyrant both in Title and Regiment; and so commonly term'd and reputed in all Times since.* (*Life of Hen. 7.* p. 1.) And in another Place he tells us, That though *Henry VII. should obtain by Parliament to be continued King, yet he knew there was a very great Difference between a King, that holdeth his Crown by a Civil Act of the States, and one that holdeth it originally by the Law of Nature and Descent of Blood: (ibid. p. 4.)* What can be more evident, than that his Lordship believed, in these Passages, that *Richard III.* was not *King de Jure*, and that *Henry VII's* *Parliamentary Title* was not of equal Force and Authority with one by Blood? Again, Another Doctrine which undeniably flows from the Doctor's Principles, is this; That *whoever loses his Throne,*

Throne, must sit still contentedly, without using any Endeavours for the regaining of it; because the Person in Possession of it, is by the Laws of the Realm absolutely entitled to the Allegiance of the Subjects. But his Lordship expresses the greatest Indignation imaginable against such an Opinion: *Shall a Prince (says he, in his Considerations upon a War with Spain, p. 3.) that is dispossessed, not make war for the Recovery? No Man is so poor of Judgment as will affirm it, &c.* Lastly, in his Case of the *Post-Nati*, he has this Passage; 'That Allegiance continueth after Laws. I will only put the Case, which was remember'd by two great Judges in a great Assembly, which was; That if a King of England should be expelled his Kingdom, and some particular Subjects should follow him in Flight or Exile in Foreign Parts, and any of them there should conspire his Death; that upon the Recovery of his Kingdom, such a Subject might by the Law of England, be proceeded with, for Treason committed and perpetrated at what Time he had no Kingdom, and in Place where the Law did not bind.' Here we see Treason may be committed against a King out of Possession; and therefore his Lordship was not of Sir Edward Coke's Opinion, who thinks the King *de Facto* only is the *Seignor le Roy*, to be understood in all Statutes of Treason. But Sir Edward Coke himself was not always of this Opinion; for in the famous Case of the *Post-Nati*, being required in the House of Lords to declare his Judgment in that Matter, with the rest of the Judges; Two of the Points insisted upon were these; *That Allegiance is after Laws; and that Allegiance followeth the Natural Person, not the Politick.* *A prouver ceo fuit dit, que si le Roy soit expulse par force, & auter usurpe, encore le Allegiance n'est toll, comment que le loy soit toll.* These Words are very plain and clear, and shew, that Allegiance may be due to a King out of Possession; but it will be asked, how does it appear, that this was Sir Edward Coke's Opinion? I answer, Sir Francis Moore tells us, it was; (*See his Reports in the Case of the Post Nati.*) and we have no Reason to doubt of his Testimony. He says, *The Lord Chief Justice Popham, the Lord Chief Justice Coke, and Chief Baron Fleming, did give in this Answer with one Assent; and that the rest of the Judges did affirm the same, excepting Walmsly.* So that now we have not only my Lord Chief Justice Coke's Opinion for the Authority of a King *de Jure* out of Possession, but also that of the whole Bench of Judges; to whose unanimous Resolutions the Doctor at other Times is willing to pay so great a Deference. This Passage out of Sir Francis Moore's Reports, had been before

before objected to the Doctor, to which he has thought fit to make such a Reply, as shews he had as little Respect for his Reader, as for his Adversaries. p. 219.

This Remarker, says he, (*Defence*, p. 109.) cites Moore's Reports, where it is said, that *Allegiance follows the Natural Person of the King*. Here the Doctor stops short, and makes this shrewd Repartee, as if (says he) a *King de Facto* had not a *Natural Person*. But how can the Doctor's Adversaries help it, if Judges are sometimes impertinent; and Sir Edward Coke himself (the Doctor's Oracle) does not always speak Sense? For the Proposition here ridiculed by the Doctor, was Part of an Argument made use of by that great *Chief Justice*; and it is no otherwise applied by the Objector (with whom the Doctor was concern'd) than it was by the Judges themselves in Moore's Reports. Let the Reader be pleased to examine the Place, and he will find, that the Intention of the Judges was to prove, that *Allegiance may be due to a King of England, in a Country, where the Laws of England are of no Authority*; and in order to this, they lay it down as a certain Proposition, that *Allegiance is after the Laws*; because it follows the *Natural Person of the King, not his Politick*; that is, though a King of England should be out of his Dominions, where he cannot put his Laws in Execution, and do the Office of a King; yet he still retains a Right to the Allegiance of his Subjects: Is it not, then clear, in their Opinion, that *Allegiance* does not follow *Possession*? And is not this a Point of Law destructive of the Doctor's Positions? But the Judges proceed farther: They add, *That if a King be expelled by Force, and another usurps, yet the Allegiance is not taken away, tho' the Law is*: One would think now, that the Sense of these Words were plain and obvious; that by the *King expelled*, would be meant a *King de Jure*, because no other's Throne can be *usurped*; and that whoever possesses the Rights of the *King de Jure*, though he be styled *King de Facto*, is an *Usurper* in the Intention of these Judges: By no means, says the Doctor: By *Usurper* in this Place, you must not understand a *King de Facto*; this cannot be; because the Law is so far from ceasing under a *King de Facto*, that it is administered not only actually, but legally, &c. and therefore by another that usurps, must be understood a Simon Mountfort, a Lady Jane Grey, or an Oliver, under whom the Laws did cease; and no Judicial Proceedings were valid any farther, than confirmed. But the Doctor has here grossly mistaken the Meaning of the Judges; p. 220. for, First, those Words *Allegiance n'estroill, com-*

ment que le loy soit toll, (which the Doctor translates, Allegiance does not cease, though the Law does) are to be understood only with regard to the Dispossessed King *de Jure*, with respect to whom the Law ceases, when he is out of his own Dominions, and has not Power to execute it; and this appears plainly from the fuller Report of this Argument of the Judges, before cited (p. 218.) from my Lord Bacon; for he tells us, they gave it for Law, that if any particular Subject, who followed the King *de Jure* in his Flight or Exile into Foreign Parts, should conspire his Death; he might, whenever that King recovered his Kingdom, be proceeded against, by the Law of England, for Treason committed and perpetrated, at what Time he had no Kingdom, and in Place where the Law did not bind. This sufficiently explains what their Lordships meant by the Law ceasing: For adly, The Law could not be said to cease under those very Usurpers the Doctor mentions. Whatever Power Simon Mountfort had, he never would presume to use it against the Authority of the Laws of England; for then he must have lost all his Interest among the Barons, on whose Assistance he entirely depended: And surely, if the Lady Jane perform'd any Acts of Government, they were agreeable to the Laws of England; if none, how could she be an Usurper! The Truth is, tho' the Doctor here, for a present Turn, is pleased to put her in the List of Usurpers; yet in another Place, (View p. 68.) where he considers her Case more deliberately, he tells us, *She never was in the Throne, and that her Government was but in Fieri, she was not Queen de Facto.*

I come now to Oliver Cromwell, under whom the Doctor affirms the Laws *did cease*; tho' it is a Matter of Fact, that cannot be contested, that his Courts of Justice had no other Rules for their Proceedings, but the Laws of England; and he may as well say, he did not govern at all, as that he governed by any other Laws, than those of England. And this was openly declared before the House of Lords, by the Attorney-General, and the rest of the Learned Counsel, in *Baden's Case*; (Rex versus Baden, p. 75.) for having argued from a Judgment given in *Oliver the Protector's*

Time, it was thereupon said, *That tho' it might be surmised that this was an Opinion vented in evil Times; yet 'tis well known, that excepting their Criminal Proceedings, the Law flourished, and the Judges were Men of Learning; as Mr. Justice Twisden hath often affirmed upon the Bench.* Well; but though the Law was actually administred by Oliver Cromwell, yet the Doctor says it was

not

not legally; and therefore his Judicial Proceedings were not valid any farther, than confirmed. Now here I am entirely of the Doctor's Mind, that the Law was not legally administered by Cromwell, but may we therefore say, the Law ceased under his Government? If we may, I know not how the Doctor's Three *Henrys* of the House of Lancaster can be acquitted of being *Usurpers*; for all their Judicial Proceedings were confirm'd by Edward IV. which the Doctor looks upon as an evident Proof of their want of Validity. In a word the Doctor's Kings *de Facto* are frequently styled *Usurpers* in the Laws of England, as well as Cromwell; and therefore since the Law has made no Difference between them, I shall never think it reasonable to believe, the Judges have done so in the present Case.

The Doctor's next Author is my Lord Chief Justice Hale; but the Passages I have already cited out of his Writings, shew, that his Opinion was clearly against the Doctor; and the Reader will be very sensible of this Truth, by the following View of them. 'A King *de Facto*, (says he *Historia Placitorum Coronæ MS. Vol. 1. cap. 13. touching High Treason in compassing the Death of the King, Queen, or Prince, in the Stat. 25 Edw. 3*) 'but not *de Jure*, such as were Henry IV. V. and VI. being in the sole and actual Possession of the Kingly Style and Government, is a King within this Act. And in such Case, the Right Heir of the Crown sitting still in a private Capacity, is not a King within this Act, till he obtain the Exercise of the Sovereign Power. This was the Case of Edmund Earl of March, and Richard Duke of York, who successively were the Right Heirs of the Crown, after the Death of King Richard II. as being descended from Lionel Duke of Clarence, the third Son of Edward III, whereas Henry IV. was descended from John of Gaunt, fourth Son of Edward III. and younger Brother of the Duke of Clarence, as appears at large by the Statute of 1 Edward IV. and the Book of 4 Edward IV. where the Act is printed. In the Thirty Ninth of Henry VI. Richard Duke of York p. 222. made out his Title to the Crown, by his Claim in Parliament, which Title, notwithstanding the Objections offer'd against it, was allowed, and acknowledged; (*Vide Rot. Parl. 39. Hen. 6. n. 15. & sequentibus*) but it ended in a Composition, that Henry VI. should hold the Crown during his Life, and that after his Death it should come to Richard Duke of York. Altho' the Duke of York was recognized Right Heir of the Crown; yet inasmuch

' as by Accord in Parliament, *Henry VI.* was to hold it
 ' during his Life; and the Duke during that Time, was as
 ' it were suspended from the actual Exercise of the King-
 ' ly Government; the Duke was not a King within this
 ' Act, during that Time; nor was he the King's eldest Son,
 ' within the succeeding Clause; and therefore in the same
 ' Parliament Roll (x. 24.) there was a Special Clause in
 ' that Composition, that Compassing of the Death of *Richard*
 ' Duke of York, now made Heir Apparent to the
 ' Crown, should be High Treason. This Accord was bro-
 ' ken by the Means of the Queen, and *Richard* Duke of York
 ' slain; whereupon his Son and Heir *Edward IV.* the True
 ' Heir to the Crown, assumed the Crown upon the Fourth
 ' of March, which was the first Day of his Reign. If the
 ' Right Heir of the Crown be in the actual Exercise of the
 ' Sovereignty, suppose in one Part of the Kingdom, and
 ' an Usurper be in the actual Exercise of the Sovereignty
 ' in another; yet the Law judgeth him in Possession of the
 ' Crown, that hath the True Right; and the other is in
 ' Truth not so much as a King *de Facto*; but a Disturber only,
 ' and therefore not a King within this Act. This was the
 ' Case between *Edw. IV.* and *Henry VI.* Although *Edward*
 ' *IV.* took upon him the Sovereignty, and was declared
 ' King in London, upon 4 Martii 1460, yet *Henry VI.* was
 ' in the Northern Parts and treated as a King, and raised
 ' a great Army; which being subdued by King *Edward IV.*
 ' in the latter End of May, in the bloody Battle of *Towton-*
 ' *Field*; then, and not till then, had *Edward IV.* the total
 ' and quiet Possession of the Crown; and in November fol-
 ' lowing held a Parliament, wherein his Title is declared,
 ' and the Commencement of his Reign enacted
 p. 223. ' to be 4to Martii before; and *Henry IV.* *Henry*
 ' *V.* and *Henry VI.* declared Usurpers. During
 ' this Interval from 4to Martii to June, *Henry VI.* was
 ' used as King; and yet was not so much as a King *de Facto*;
 ' *Edward IV.* the Right Heir being likewise in Possession
 ' of the Regality. The like was between Queen *Mary*,
 ' and the Lady *Jane Dudley*, who was proclaimed Queen at
 ' London, by Pretence of Nomination by King *Edward VI.*
 ' but held not the Title above Ten Days. For the same Time
 ' Queen *Mary* openly laid Claim to the Crown, and was
 ' also proclaimed Queen. So that both being *de Facto* in
 ' Possession of the Crown, the Law adjudg'd Possession in
 ' her, that had the Right, viz. Queen *Mary*; and therefore
 ' by an Act of Parliament (1 Mar. c. 3.) it is enacted, that
 ' Recognizances dated An. 1 Regina *Jane*, shall be allowed

as good, which needed not have been, if she had been *Regina de Facto*, tho' an *Usurper*. Because *Judicial Acts* are not Diminutions of the Regal Revenue. 9 *Edw.* 4. 15.

11. And if any shall say, that if *Henry VI.* or Queen *Jane* had gotten the Victory and Possession of the Crown, that possibly as much would have been asserted by them and their Participhants against *Edward IV.* and Queen *Mary*: This is an Objection of no Value; for I do not take my Measures herein from Events, which are various and uncertain; but according to the true Right of Matters, pursuant to the Laws of *England*, as near as I can.

That Lawful Prince (*Hist. Plac. Coron. cap. 10. Concerning Allegiance*, Vol. 1.) 'that hath the Prior Obligation of Allegiance from his Subjects, cannot lose that Interest without his own Consent, by his Subject's resigning himself to the Succession of another. And hence it is, that the Natural-born Subject of one Prince, cannot, by swearing Allegiance to another Prince, put off or discharge himself from that Natural Allegiance. For this Natural Allegiance was Intrinsick, and Primitive, antecedent to the other; and cannot be devested without the concurrent Act of that Prince, to whom it was first due.

Altho' (*Hist. Plac. Coron. cap. 13. Vol. 1.*) *Edward II.* had a kind of pretended Deposing, and was pretended to have resign'd; and his Son *Edward III.* took upon him the Kingly Name and Office; yet in p. 224. the Opinion of those Times, *Edward II.* continued, as to some Purposes, his Regal Character: For in the Parliament (4 *Edw.* 3.) *Mortimer, Beresford, Gurny, &c.* had Judgment of *High Treason* given against them, for the Death of *Edward II.* after his Deposition. Neither was that Judgment grounded simply upon the old Opinion in *Briton*, that Killing of the King's Father was Treason: For tho' in some Parts of that Record (as in the Judgment of the Lords against *Mortimer*) the Words are, *Touchant le mort Seignor Edward Pere nostre Seignor le Roy qui ore est*, &c. yet in other Parts of that Roll of Parliament, he is styled, at the Time of his Murder, *Seignor Leige*; and sometimes *Rex*, as N. 6. The Lords make their Protestation, that they are not to judge any, but their Peers; yet they declare, that they gave Judgment upon some, that were not their Peers, in respect to the Greatness of their Crimes; *Et ce per encheson de murdre de Seignor Liege*, &c. And in the Arraignment of *Thomas Lord Berkly*, for that Offence, the Record of his Arraignment is, *Qualiter se velit acquistare de morte ipsius Domini Regis*. And the

' Verdict, as it was given in Parliament, (4 Edw. 3. N. 16.)
 ' and the Record is, *Quod prædictus Thomas in nullo est culpa-*
 ' *bilis de morte prædicti Domini Regis Patriæ Domini Regis*
 ' *nunc, &c.* So that the Record styles him *Rex* at the Time
 ' of his Death; and yet every one acquainted with Histo-
 ' ry knows, that his Son was declared King, and took
 ' upon him the Kingly Office and Title, upon the 25th,
 ' or, according to *Walsingham*, 20 *Januarii*; and *Edward*
 ' *II.* was not murder'd till the 21st of *September* following.
 ' I have been the longer in this Instance, though it were
 ' before the Making of this *Statute* 25 *Edw. 3.* that it may
 ' appear, that this Judgment was not singly upon this Ac-
 ' count, that he was Father to King *Edward III.*; but
 ' they believed, that, notwithstanding the formal *Deposing*
 ' of him, and the pretended or extorted Resignation of
 ' the Crown, mention'd by the Histories of that Age;
 ' yet they still thought the Character *Regius* re-
 p. 225. ' main'd upon him; and the Murder therefore
 ' of him to be no less, than *High Treason*;
 ' namely, the Killing of him, who was still a King,
 ' tho' deprived of the actual Administration of his King-
 ' dom."

I must expect to be told, that the foregoing Extracts
 are taken out of a Book of my Lord Chief Justice *Hale's*,
 to which the World is a Stranger; that where it is to be met
 with, is a Secret, and hardly possible to get Access to it;
 so that the Authority of these Citations depends entirely
 upon the single Credit of an unknown Transcriber; and
 consequently it cannot reasonably be expected, that much
 Weight should be laid upon them, in a Controversy of
 such Moment. To these Objections I can only answer,
 that I am well assured, these Citations were faithfully
 transcribed, many Years ago, from one of the *Folio* Volumes
 of the *History of the Pleas of the Crown*, written by my Lord
 Chief Justice *Hale*, which was then in the Custody of his
 Grandson, at his Seat in *Gloucestershire*: And this is all I
 can pretend to say for their Authority; with which if the
 Reader is not satisfied, I must be contented to stay for my
 Vindication till they are published, which it is to be hoped,
 will be in a short Time. I doubt not however, but those
 that are acquainted with my Lord Chief Justice *Hale's*
 Writings, will be of Opinion, that they sufficiently speak
 for themselves; or at least, that there are such Marks of
 Learning and Judgment in them, as evidently shew, they
 are by no means unworthy of him. But whatever may be
 the Fate of these Extracts, I would not have the Doctor
 imagine,

imagine, that we are destitute of Proofs from other his Lordship's Writings, to manifest his Disapprobation of the Doctor's Notions. His MS. *History, and Analysis of the Common Law*, has been printed, and is in many Hands; in which (Cap. 5.) speaking of Right acquired by Conquest, he has these Words; *But still all this is intended of a Lawful Conquest, by a Foreign Prince or State; not of a Usurpation by a Subject, either upon his Prince, or Fellow Subject; for several Ages and Descents do not purge the Unlawfulness of such an Usurpation.* That is, such Usurpers, though they may be Kings *de Facto* for many Successions, yet do not become Kings *de Jure*. An Opinion directly contrary to the Doctor's. Again; *The Manner of Acquest of the Regal Title, or Dignity, is either a Lawful Acquest, or an Unlawful one. A Lawful Acquest of the Regal Title, is either, first, by Municipal Laws and Constitutions of the Kingdom, which is no other but Hereditary Descent, according to the Laws and Customs of the Descent of the Crown of England. An Unlawful Acquest, which is by Usurpation, is when a Subject shall invade the Right of the Crown, from him that is Rightful and Lawful Heir thereunto; and was done by King Stephen upon Maud; by John upon his Nephew Arthur; by Henry IV. upon Richard II. by Henry V. and VI. upon the Line of York; by Rich. III. upon his Nephew. And herein is considerable, what Power the Law allows to such Usurpers, and what it denies.* Here it is plain, the Doctor's Kings *de Facto* are called *Usurpers*; and though he says, the Law allows them some things, that must be understood only of such things as are necessary for the Order of Government, and not at all inconsistent with the Rights of the King *de Jure*.

The Doctor has now done with his *Modern Lawyers*; and in Requital, I shall set before him some Opinions and Practices of such as are ancient; and shew him, that the Laws themselves teach us quite a different Doctrine, than what he has advanced. It is a known Position of the Doctor's, *That a King de Facto has all the Powers, Privileges, and Prerogatives of a King de Jure.* (View, p. 12.) But the Practices of the great Councils in King Stephen's, and Henry IV's Reigns, sufficiently shew they were of contrary Sentiments: For when the Bishops and Clergy, in a general Assembly, were press'd by King Stephen to secure the Succession to his eldest Son *Eustachius*, they absolutely refused it, as an Act of the highest Injustice to a Prince that had a better Title. Is it not then evident, that the eldest Son of a King *de Facto* was not then thought to have a Right to

succeed his Father in the Possession of the Crown ?
 p. 227. But nothing more clearly proves this Defect of Title in the Issue of Kings *de Facto*, than the Parliamentary Provisions made for the Succession of Henry IV's Children. In the fifth Year of his Reign, the Lords in Parliament swore to the Succession of his eldest Son, and his Heirs : This however did not satisfy him ; and therefore two Years after, an Act passed for settling the Crown on his Sons, and their *Issue Male* ; and this was undoubtedly then looked upon, as a great Point gain'd ; but still it was not to Henry IV's Mind ; for by this *Act* the Female Descendants from him and his Sons were excluded, with their Issue : About half a Year after therefore, he gets the Parliament in a good Humour, and prevails with them to settle the Succession of the Crown upon him and his Sons, and their Heirs ; whereby their Daughters, for Want of Male Issue, were made capable of the Succession. (Rot. Parl. 7 & 8 Hen. 4. c. 4. and Rymer's *Acta Publica*. Tom. VIII. p. 462.) Now a King *de Jure* never wanted these Parliamentary Settlements ; the *Common Law* of England having effectually provided for the Succession of his Issue ; and if Hen. IV. had been a King *de Jure*, that is, one that possess'd the Crown by Lineal Descent, and Right of Blood ; as he would have had no Occasion for such *Acts of Parliament* ; so we may be confident, none of that Nature would ever have been denied.

In the 21st of Richard II. a Petition was presented to the Parliament, for the Restitution of the *Spencers* ; and an Act pass'd accordingly ; for which one of the Reasons now upon Record, was this which follows ; *viz. Because Edward II. was living, and true King, and held in Prison by his Subjects, at the Time of that very Parliament of 1 Edward III. when the Judgment against the Spencers was declared good.* (Rot. Parl. 21 Rich. 2. N. 64.) Now here we have an express Parliamentary Acknowledgment, that a King may retain his Authority after the Loss of his Crown ; and that Laws made by the Usurper, do not bind the Rightful Successor. The Doctor could not but be sensible, that this was an Objection of Importance ; and therefore he has taken some Pains to remove it. And, First, He says, (*View*, p. 58.) *This Act of Confirmation of the Judgment against the two Spencers (1 Edw. III.) was not declared void by the 21 Rich. II. but repealed ; and therefore valid, until* p. 228. *repealed.* But this Answer will not do the Business ; for from the Passage before recited out of the Records of 21 Richard II. I do not pretend to infer the immediate Nullity of

of the 1st of *Edw. III.* from the Time of the making of it; but only the Invalidity of it with Respect to *Rich. II.*'s Right, to declare it void, whenever he pleas'd. And therefore it is not material to say, he never used this Power; for the proper Question is, Whether he had not a Right to use it? Which we see was plainly confess'd in open Parliament. The Doctor may remember, I choose rather to say, *Acts of Usurpers* are voidable, than void; and therefore, tho' none of the *Acts* made by *Edw. III.* while his Father was alive, had ever been declared void; yet it would have been still true, that *Rich. II.* had Authority, as King *de Jure*, to exercise that Power; which sufficiently shews the Difference between a King *de Facto* and a King *de Jure*. 2dly, The Doctor urges, that the 21 *Rich. II.* was repealed by the 1 *Henry IV.* To which Answer the Learned Bishop *Stillingfleet* some while since, was contented to make the following Reply. *The Parliament of 2 Rich. II. was not, says he, legally repealed; for Richard II. was alive, and in Prison, when Henry IV. repealed the Parliament of 21 Richard II. (The grand Question concerning the Bishop's Right, p. 83.)* And besides this, 1 *Henry IV.* was declared void by the 1 *Edw. IV.* For in that Parliament, it is ordained, and declared, that all Statutes, Acts, and Ordinances heretofore made, in and for the Hurt, Destruction of the Right and Title of the late King Richard, and against his Royal Dignity and Governance, &c. shall be void, and be taken, holden, and reputed void, and for nought, adnulled, repealed, revoked, and of no Force, Value, or Effect. Now certainly it cannot be denied, but the Repealing of the whole Parliament of the 21 *Rich. II.* and that during the time of his Imprisonment, was an Act against his Right, Title, Royal Dignity, and Governance; and consequently it is adnull'd by the Words of the Record now recited.

I proceed now to put the Doctor in mind of some other Declarations in Parliament, no less clear and expressive against his Notions of our Constitution. It is an evident Consequence, from the Doctor's Positions, that the Dispossess'd King cannot justly make p. 219. War upon the Usurper of his Dominions, for the Recovery of them; that he has no Right to the Allegiance of the Inhabitants of those Countries; and consequently, that for them to assist him in such Attempts, is downright Rebellion; and renders them obnoxious to the Pains and Penalties of it. But the direct Contrary is asserted in the Records of Parliament, which I recommend to the Doctor's Consideration, in the ensuing Passages. When *Richard Duke of York* had been attainted by *Henry VI.* at Co-

ventry; the Parliament Roll (1 Edw. 4. Sect. 13.) says,
 ' That the said Noble Prince *Richard* Duke of *Tork*, using
 ' the Benefice of the Law of Nature, and sufficiently ac-
 ' companied for his Defence and Recovery of his Right to
 ' the Crown of this Realm, came thereunto, not then ha-
 ' ving any Lord therein above him, but GOD; and in the
 ' Time of a Parliament holden by the said *Henry*, late cal-
 ' led King *Henry* VI. the 6th Day of *October*, the 39th Year
 ' of his said Usurped Reign; intended to use his Right,
 ' and to enter into the Exercise of the Royal Power, &c.
 ' as it was Lawful, and according to Law, Reason, and
 ' Justice for him so to do. And thereupon shew'd, open'd,
 ' declared, and proved his Right and Title indefeasible,
 ' whereunto it could not be answer'd, &c.' And in the same
 Roll, (Sect. 10.) it is affirm'd, ' That the Commons having
 ' evident Knowledge, that King *Edward* IV. was in Right,
 ' from the Death of his Father, very just King of the Realm
 ' of *England*; and on the 4th Day of *March* in lawful Pos-
 ' session of the same; did desire it might be enacted, That
 ' the Taking of Possession, and Entree into the Exercise of
 ' the Royal Estate, Dignity, Reign, and Governance of the
 ' said Realme of *England*, and Lordship of *Ireland*, of our
 ' said Sovereign Liege Lord King *Edward* IV. the said 4th
 ' Day of *March*, and the Amotion of the said *Henry*, late
 ' called King *Henry* VI. from the Exercise, Occupation,
 ' Usurpation, Intrusion, Reign, and Governance of the
 ' same, done by our said Sovereign, and Liege Lord King
 ' *Edward* IV. the said 4th Day of *March*, was, and is right-
 ' wise, lawful, and according to the Laws, and Customs of
 ' the said Realm; and so ought to be taken, holden, repu-
 ' ted, and accepted.' And a little after, (Sect. 32.) it is
 farther added; ' Where certain Persons of evil, riotous,
 ' and seditious Disposition, joyed in Rumour, and rebellious
 ' Novelrys, adhering to *Henry* IV. late in Deed, and not of
 ' Right King of *England*, after his unrighteous,
 r. 230. ' unlawful, and detestable Usurpation, and In-
 ' trusion, against his Faith and Ligeance, upon
 ' King *Richard* II. his righteous, true, and natural Liege
 ' Lord, tyrannously murdered, with great Cruelte, and hor-
 ' rible Violence, in an outrageous heady Fury, the Right
 ' Noble, and Worthy Lords *John* Mountague late Earl of
 ' *Salisbury*, and *Thomas* late Lord *Le Despenser*, and other
 ' true Subjects, and Liege Men of the said King *Richard*,
 ' after his Decease, continuing their Faith, and Ligeance,
 ' according to their Duty to GOD, and to the Laws, and
 ' Customs of the Realm of *England*, to *Edmund* Mortimer,
 ' then

' then Earl of *March*, next Heir of Blood of the same King
 ' *Richard*, and in Right after his Decease to have succeeded
 ' as True, and Righteous King, &c. And whereas Judg-
 ' ment was given against them in a pretended Parliament,
 ' &c; it is ordeined, that the seid Judgment be annulled
 ' and void.' *And to the same purpose is this, which follows:*
 ' The Petition of *Thomas Lumley Knt.* Cofin and Heir to
 ' *Rauf Lumley Knt.* &c. sheweth, That where the said *Rauf*
 ' and other were cruelly murdered and slain by *Henry IV.*
 ' late in Deed, and not of Right King of *England*, for the
 ' true Faith, Duty, and Ligeance, that they bore to the
 ' Right Noble Prince King *Richard II.* in his Days, and af-
 ' ter his Decease, unto *Edmund Mortimer Earl of March*,
 ' next Heir to the seid King *Richard*, &c. and that in a
 ' Parliament holden the 2d. Year of the seid Usurped
 ' Reign, &c. a Judgment of Treason was given against
 ' the seid *Rauf*, &c. Wherefore please it your Highness to
 ' stablish and enact the seid Judgment to be void, &c.
 Which was done accordingly; that Petition being read in
 open Parliament, and by the Assent of the Lords and Com-
 mons approved of by the King. I am persuaded, had the
 Doctor taken Notice of these Passages in our Records, he
 had entertain'd different Thoughts of our *Constitution* from
 those, he has been pleas'd to publish.

It is a Maxim of the Law of *England*, That the
 King cannot be in a worse Condition than a Private p. 231.
 Subject; (*Tear Books 4 Edw. 4.*) that is, it cannot
 be supposed, that the Law has taken less Care of his
 Rights, than those of his Subjects: Now in the Case of
 Private Men nothing is more remarkable, than the great
 Concern of our Laws, to secure their Properties, and to
 procure them Justice when they are wronged; and there-
 fore there is not a more established Rule in Judicial Pro-
 ceedings, than this, that *the Law favoureth Right, even be-
 fore Possession*; upon which a Gentleman of eminent Know-
 ledge in his Profession, has left us the following Comment:
 (*Sir Hen. Finch on Law. B. 1. c. 3. p. 29. 45.*) *When two are in
 a House or other Tenements, and one lays claim by one Title, the
 other by another Title; the Law adjudgeth him in Possession, that
 hath a Right to the Tenements.* We are in Justice therefore
 bound to believe, that the King's Rights are at least as sa-
 cred in the Eye of the Law, as the Properties of Subjects;
 and consequently, that the Law cannot countenance the
 Doctor's Positions, which manifestly favour *Wrong against
 Right*. One would think, if the Doctor's Notions were
 at any time in Esteem, we should meet with some Proofs
 of

of it in *Henry VI.* and *Edward IV.*'s Reigns, when Subjects had most occasion to make use of them in those frequent Turns and Revolutions of Affairs; yet nothing to this purpose has he been hitherto able to produce, from the Histories of those Times; but I think I may say, we have good Evidence to shew, that they were slighted and condemn'd even by Kings *de Facto* themselves, and their Parties. When *Henry VI.* recover'd Possession of the Kingdom, he treated those that had adhered to *Edward IV.* as Traitors and Rebels; he reversed all the *Acts* of that Prince, as illegal, and of no Authority; and whenever he had occasion to mention him, it is no better Terms, than those of *Traitor* and *Usurper*; he styles him his *Great Rebel* (Rymer. *Acta Publica*. Tom. II. p. 680, 696, 705, 706.) who *bad lately possessed the Crown and Regal Dignity by Usurpation, and was only de Facto and not de Jure King.* And in the 1st of *Henry VII.* it is declared in Parliament p. 232. that *Henry VI.* *had been attainted of High-Treason, contrary to due Allegiance.* (Rot. Parl. Hen. 7.) Then it seems *Edward IV.* even whilst he was upon the Throne, owed Allegiance to *Henry VI.* when he was out of it; a Doctrine utterly inconsistent with what the Doctor teaches us. Let us now see, whether it may be discover'd, from the Behaviour or Writings of any of the Friends and Adherents to *Henry VI.* that they were influenced by such Principles, as the Doctor commends. And I shall particularly take Notice of Sir *John Fortescue*, and Dr. *Morton*, afterwards *Archbishop of Canterbury*, *Lord Chancellor*, and *Cardinal*; Men eminent in their Generations, for their Wisdom, and Knowledge of our Constitution. Sir *John Fortescue* was *Lord Chief Justice of England*, under *Henry VI.* when that Prince was driven from his Throne by *Edward IV.* but no sooner did that Calamity befall his Master, and the fatal Battle of *Towton-Field* (in which Sir *John* was present) had fixed the Crown on *Edward's* Head, but he retired out of *England* with the Deprived Queen, and the Unfortunate Prince her Son. In this voluntary Exile from his Native Country he continued several Years, with so little Sense of his Duty to *Edward*, though now King *de Facto*, that he not only scorn'd to make any Application to him for his Pardon and Favour, but by Seditious Writings against his Title, he made it his Business to animate those, that were disaffected to him. Afterwards indeed he was contented to make his Submission; and his humble Petition is to be met with in the Records of Parliament; (Rot. Parl. 1; Edw. 4.) but he could never be brought to this Compliance, till *Henry VI.* and his Son were both dead; and

and consequently the House of *Lancaster* entirely extinguished. What now can be pleaded in Defence of this great Man? A Person so eminently skill'd in the Laws of his Country, could not certainly be ignorant of the *English* Constitution. If, as the Doctor affirms, he was bound by it to pay his Allegiance to the King *de Facto*; surely King *Edward* was the only Person, that could lay claim to it on that Account; for he alone was in Possession. Shall we say then, that he was guilty of Rebellion, in Opposing his Lawful Prince, and not making an early Submission to him? I am afraid the Doctor will not readily approve of this Sentence; because I find him citing him (*View of the English Const.* p. 98.) with great Reverence, as an Author of Consequence to his Cause; and yet I know not how we shall be able to acquit him, when we have thorowly consider'd all the particular Circumstances of his Behaviour. In the mean time, I will be bold to say, *Allegiance* he did indispensably owe to one King or other, either to *Edward* in Possession, or to *Henry* that was out of Possession; for no Natural-born *Englishman* can put himself out of the Condition of a Subject; or dissolve those Obligations of Duty and Obedience, which commence together with his Life: If it were so, Subjects might quit their Country, and transfer their *Allegiance* to what Prince they pleased, according to the Exigencies of Times, and their particular Humours and Inclinations; but the Laws of *England* will allow of no such Liberty; and therefore when Dr. *Story* pleaded (upon an Indictment of High Treason in Queen *Elizabeth's* Reign) that the Judges had no Power over him; for that he was a sworn Subject to the King of Spain; he was condemn'd according to the ordinary Form of *Nihil dicit*; because no Man can shake off his Country, wherein he was born; nor abjure his Native Soil or Prince at Pleasure; and so he suffer'd as a Traitor. (*Camden's Annals of Queen Elizabeth*, B. 2. An. 1571.) It is not therefore to be doubted of, but Sir *John Fortescue* was sensible, he was still under the Obligations of an *English* Subject; and since it is certain, he followed the Fortune of *Henry VI.* and adhered to his Interest; it is to be presumed, he believed, that he was the only Rightful and Lawful King, tho' forced from his Throne; and not *Edward*, who was in full Possession of it. We have the same Account in our Histories given us of Dr. *Morton*; He was a Man (says an eminent Author) *Sir Thomas Moore's Life of Richard 3.* of great natural Wit, very well learned, and honourable in Behaviour. He had been fast upon the Part of King *Henry VI.* while that

Part was in Wealth; and nathlesse left it not, nor forsook it in Woe; but fled the Realm with the Queen and the Prince, while King Edward had the King in Prison; and never return'd home, but to the Field; which being irreco-

p. 234. verably lost, King Edward did not only offer him his Pardon but invited and wooed him unto his Service, &c.

What Apology now can be made for these Gentlemen? Their Friends, it is true, think it an honourable Part in them, to preserve their Fidelity to their Prince and Benefactor, amidst his Misfortunes; but what then will become of our Constitution? That, says the Dr. cancels all Obligations to Gratitude; requires 'em to desert a sinking and hopeless Cause, and demands their Allegiance for his greatest Enemy, who in their opinion, fills his Throne by Violence and Injustice. Thus we see two of the most considerable Friends to *Hen. VI.* whose best Title has been hitherto supposed to be his Possession of the Crown, persever'd in their Loyalty to him for near ten Years, though he was a Prisoner most of that Time, without the least Hopes of ever mending his Condition. Is this a Sign that the Doctor's Principles were understood in those Days, when of all others he would persuade us they most flourished? But Sir *John Fortescue* has yet more to answer for; he did not only withdraw from his Country, and refuse to submit to the Possessor of it; but accepted of the Title of *Chancellor of England*, though granted him by a *Deposed King*; and which is still worse, by his Writings he openly asserted the Right of *Henry VI.* and the Unlawfulness of obeying *Edward IV.* We have still extant, in the *Cotton Library*, his *Defence of the House of Lancaster against that of York*, in which he labours to prove, by sundry Arguments, that the sole Right to the Crown of *England*, as well by Lineal Descent, as by the Resignations of the House of *York*, was then entirely in King *Henry*. He pretended that *Philippa* (from whom the Families of *Mortimer* and *York* derived their Claim to the

Crown, was not owned by the Duke of *Clarence*
p. 235. for his Daughter; that by the Law of *England* the Crown cannot descend to a Woman; and lastly, he bestows no better Appellation upon King *Edw.* than that of *Usurper*; and expressly declares, he held the Crown no other wise, than by Violence and Injustice. Can better Arguments be desired than these, that Sir *John Fortescue* did not approve of the Doctor's Notion? For would any Man take the Pains to prove, that a Prince out of the Throne is his only Lawful Sovereign, who yet is persuaded that Allegiance is wholly due to a King *de Facto*? Besides

his

his Book in Praise of the Laws of England, was drawn up in the Time of his Exile, entirely for the Use and Service of the young Prince, eldest and only Son to Henry VI. that he might be timely instructed in the Laws of his Country, of which he looked upon him as the only Rightful Inheritor, after his Father's Decease. For this Reason we find him addressing himself frequently to that young Prince in most respectful Language, as to the *Heir Apparent* of the Crown; *You*, says he, (*Fortescue de Laud. Leg. Aug.*) most renowned, divine Prince, who in time are to govern the Kingdom of England . . . I conjure you again and again, that you learn the Laws of your Father's Kingdom, to whom you are to succeed; with several other Passages to this Purpose. Now it is impossible to conceive, that the Author of these Expressions could intend them for any other Purpose, than as Compliments to a Prince intitled to the Inheritance of the Crown by the Laws of England: For upon what other Account could he tell him, he should one Day govern England, and succeed his Father in his Kingdom? Unless we are to suppose, Sir John spoke all this p. 236. prophetically, as an Event which should certainly come to pass, without any Regard to his present Right. I conclude therefore, that nothing can be more evident, than the Contrariety between this Gentleman's Notions of our Constitution, and the Doctor's. Sir John Fortescue thinks it his Duty to adhere to a Deposed King against the Possessor of his Throne: He asserts his Right in the Field with his Sword; in his Retirement with his Pen; and interprets the Laws of his Country for a *King de Jure* against a *King de Facto*. To all this let me add, That when he made his Peace with King Edward, he retracted all that he had written against his Title; and asserted his Right with the same Zeal and Vehemency, that he had, before, King Hen. VI's; for which he is highly commended by my Ld. Ch. Just. Coke, (*Pref. to the 10th Vol. of his Reports*) as an Instance of his great Sincerity and Love for Truth. Now a properer Occasion than this could not be offer'd him, of acknowledging his former Error in paying Allegiance to a *King out of Possession*; and at the same time, he could not in Justice decline the Opportunity of vindicating the Authority of *Kings de Facto*, were there any Foundation in Law for such an Assertion, or had he been persuaded of the Reasonableness of it. But to our great Surprise, we find nothing in his Retraction to this Purpose; it is still extant, and may be perused, by those that are curious, in the Cotton Library; but whoever gives himself the Trouble, will be sensible,

lenfible, that the whole Design of that Book is to prove the Right of *Edward IV.* from his Lineal Defcent from the Duke of *Clarence*, and Nearnefs of Blood to *Richard II.* without any regard to his Poffeffion. (Bibl. Cotton. Otho. B. 1. *This Retractation of Sir John Fortescue is mentioned in the Records.* Rot. Parl. 13 Edw. 4.)

There is one Thing more, that muft not be omitted in this Place, tho' I had before Occafion to take Notice of it; and that is the Opinion of the Judges, together with Sir *Jeffry Palmer*, Sir *Heneage Finch*, Sir *Edward Turner*, and Mr. *Wadham Wyndham*, upon the Tryal of the *Regicides*. It was refolved by them, that the Indictment for the King's Murder fhould conclude, *Contra pacem nuper Domini Regis, Coron. & Dignitat. fuas, necnon contra pacem Domini Regis nunc Coron. & Dignitat. fuas.* And they likewise p. 237. agreed, that though King *Charles II.* was de Facto kept out of the Exercife of the Kingly Office by Traitors and Rebels, yet he was King both de Facto and de Jure. This Account is given by Sir *John Kelyng* in his Reports [p. 11. 15.] publish'd with the Allowance and Approbation of my Lord Chief Juftice *Holt*, Mr. Juftice *Powell*, Sir *Littleton Powys*, and Sir *Henry Gould*. It is evident from it, that neither the Title of King, nor the Allegiance of Subjects, is upon any Account due to an *Usurper*. Thus fome Paffages from our Laws, and certain Testimonies alfo of ancient Lawyers, clearly prove againft Dr. *Higden*, that Kings de Facto were never confider'd in our Constitution, as Juft and Legal Proprietors of the Kingdoms they poffeffed.

The Doctor having now executed his Original Design, had nothing to do, but to take his Repofe, and reflect with Pleafure upon his Performance: But tho' he had entirely fatisfy'd himfelf, and his own Confcience, he was however willing to add fome frefh Observations for the fake of his Readers. Upon fo good an Account he will now undertake to prove, that the Holy Scriptures fpeak conformably to the Laws of our Country, and highly approve of his *Englifh Constitution*. Now, tho' I cannot absolutely concur with him in this Affertion; yet fo far I am ready to agree, that his Doctrines is moft certainly to be found in Scripture, and did eminent Service in two confiderable Inftances; for this was *Shimei's* Plea, when he curfed *David*; (2 Sam. xvi. 8.) *The Lord hath deliver'd the Kingdom into the Hand of Abfalom thy Son*; that is, *Abfalom* is now in full Poffeffion of thy Throne, and confequently GOD has rejected and depof'd thee. Here we have a clear Proof of the ancient Authority of the Doctor's Principle, which his Adverfaries,

will

will never pretend to wrest from him. The other is that of *Hushai*, (*Ibid.* ver. 18.) who being reproach'd by *Absalom* for leaving *David* his Friend, justifies his Desertion by the same Reason; *Nay but whom the Lord, and this People, and all the Men of Israel choose, He will be, and with Him will abide.* By this honest Insinuation *Hushai* was immediately admitted into *Absalom's* Council; that de- p. 238. luded Prince could not suspect the Fidelity of a Man, who came into his Interest upon so pious and religious a Motive. But the Doctor will not allow, that *Hushai* err'd in his Principle; for he is confident, that GOD has always requir'd Obedience, as an indispensable Duty, to those who were in Power; and that the Scriptures furnish us with many Instances to that purpose. And, *First*, He tells us, (*View*, p. 101.) *That the Jews lived in Subjection to the Midianites, the Moabites, and other neighbouring Nations, when they were subdued by them.* Now what real Advantage the Doctor can derive from hence, is a Question: Can any one doubt, but *Submission* may be lawful even to unjust Conquerors, when once they have acquir'd a full Power and Dominion over a People, and when *Resistance* is utterly vain and impracticable? But *Submission* is one thing, and a *Recognition* of their Right another: And the latter may be often unlawful, when the first is manifestly lawful. Thus the *Cavaliers* submitted to *Oliver Cromwell*; they pay'd Taxes to him; and endured his Tyranny and Oppressions; because they saw no other Remedy: But surely they did not acknowledge the Lawfulness of his Government, nor own he had a Title to their Allegiance. For the same Reason, why might not the *Jews* live in Subjection to the *Midianites* and *Moabites*? Were they not subdued by them? Is not this confess'd by the Doctor? 2dly, Admitting the *Midianites* and *Moabites* were unjust Aggressors, and reduc'd the *Jews* under their Obedience by a causeless War, it might however be lawful for the *Jews*, not only to live in Subjection, but also to pay an entire Obedience to them, as their Rightful Governors: For possibly they were at their own Disposal, and might give up their Rights and Liberties, as they saw occasion; and then it was reasonable, they should do so in those Extremities, when the Advantage would be very considerable to themselves, and no Injury thereby done to another. Or else it p. 239. may be suppos'd, that their Prince or Ruler being in the same ill Circumstances with themselves, joins with them in this Surrender, and Dedition; and then the Subjects are sufficiently justify'd by the Consent of their Sovereign.

vereign. But had the Matter been otherwise; had the conquer'd King of the *Jews* refus'd to give up his Right, and GOD's Authority no way expressly interpos'd in the Case; would it then have been lawful for the *Jews* to have made a Compliment of their Allegiance to the *Midianites* and *Moabites* against the Will of their Prince? This is the Question, to which the Doctor's Adversaries desire Satisfaction; but this, it is to be fear'd, they will never obtain. For let the Doctor state the Fact, as he pleases; how does it appear, that this was an honest and lawful Action? Does the Scripture expressly assure us, it was so? No, that is not pretended: How can we know it then? Why, the Doctor tells us, (*View*, p. 101.) that nothing appears in Scripture to the contrary: That is, whenever an Action is not condemn'd by the Holy Scriptures, we are at liberty to think it Legal and Imitable. Thus it is allowable to put a Trick upon a Father, and defraud a Brother, as *Jacob* did to *Isaac* and *Esau*; and thus we may tell a Lye upon a Motive of Compassion, as the *Egyptian Midwives* did to *Pharaoh*; because the Scriptures do not pass any Censures upon those Facts. What has been said in Defence of the *Jews*, for their peaceable Behaviour under the *Moabites* and *Midianites*, will serve as well to justify their Obedience to the *Egyptians*, and other Conquerors, without the Assistance of the Doctor's Principle. But in the particular Case of their Subjection to the Kings of *Babylon*, we have something farther to urge in their behalf; and that is, the express Command of Almighty GOD, by Virtue of which they were oblig'd to bring their Necks under the Yoke of those Princes, (*Jerem.* xxvii. 12.) and serve them and their People: For unless we will dispute GOD's Supreme Dominion and

p. 240. Authority over the World, we must allow his Nomination alone to be sufficient to convey a Right to Princes, and render their Acquisitions lawful. Now we must do the Doctor the Justice to own, he does not call in question GOD's Prerogative to dispose of Kingdoms in this manner; but he seems to deny, that the *Jews* could be influenced by that Consideration, under the *Babylonish* Captivity. For, 1. He says the *Jews* had submitted to the King, of *Babylon* before GOD had commanded them to do so; which was not till *Zedekiah's* Reign. But surely the Prophet *Jeremy* had given the *Jews* publick Notice, in the fourth Year of *Jehoiakim*, that GOD would deliver them up to the King of *Babylon*, (*Jerem.* xxv. 9. 11.) and had condemn'd them to a State of Servitude for Seventy Years. Now this Declaration alone, though it had never been

been seconded by any express Injunction of Obedience, was a sufficient Admonition to the *Jews*, that it would be best for them to live peaceably under their new Masters; for to resist, upon a full Assurance of doing it without Success, (which GOD had before-hand warn'd them, would be their Fate) must have been the Height of Folly and Madness. Again, the Commission, by Vertue of which the Prophet spake to *Zedekiah*, to bring his Neck under the Yoke of the King of *Babylon*, was given in the Beginning of the Reign of *Jehoiakim*; (*Jerem. xxvii. 1, &c.*) and was then openly notify'd by the Bonds and Yokes, which *Jeremiah* was command to put upon his Neck. So that the *Jews* had early Notice before *Zedekiah's* Reign, that it was GOD's Pleasure, they should prepare their Necks for the *Babylonish* Yoke. But tho' the *Jews* had indeed made an outward Profession of Obedience to *Nebuchadnezzar*; tho' two of their Kings, with all their principal Subjects, were his Prisoners in *Babylon*, and found it necessary to behave themselves there with all external Signs of Humility; though *Zedekiah* govern'd *Judah* and *Jerusalem* as an *Assyrian* Province, only by Virtue of a Commission from the Conqueror, to whom he had sworn Allegiance; yet the great Searcher of Hearts knew, that this their pretended Submission was altogether hypocritical; and that they only waited for an Opportunity to shake off the Yoke, p. 241. which they were resolv'd never to bear, notwithstanding their publick Engagements to the contrary. This was the Reason of the many Messages, which GOD sent by *Jeremiah* to the *Jews*, requiring them to serve the King of *Babylon*, and threatening to abandon them entirely to the Mercy of their Enemies, if they departed from their Obedience to him. From whence it is evident, that how dutiful soever their Language and Addresses might be, nothing but Sedition and a Revolt was in their Hearts which would unavoidably end in their utter Destruction. So that the utmost Use that can possibly be made of this Case of the *Jews*, is no more than this; That *whenever a Conquer'd People are in the same Circumstances, in which the Jews then were; when their Kings are bound in Chains, and their Nobles with Fetters of Iron; and the remaining Heirs of the Kingdom have openly renounced all Pretences to it, by the most Sacred Obligations: In a word, when all Efforts for their Liberty seem evidently vain and ineffectual; and the Voice of GOD has besides declar'd, that Resistance should be their Ruin; it is then not only lawful to be quiet and peaceable, but a manifest Indication of Distracted to be otherwise.*

And now, if the Doctor can draw an exact Parallel to this Case, from any Revolutions within his Memory, let him make the best of it.

From the Old Testament we must now wait upon the Doctor to the New, to which he assures us his Doctrine is also agreeable; as appears, says he, (*View*, p. 89.) from our Saviour's Resolution of the Case, that was put to him, whether it was lawful to pay Tribute to Cæsar, or not. He bid them shew him the Tribute-Money; and only asked them, whose Image and Superscription it was, (i. e. who is in Possession of the Government?) and when they answer'd him, Cæsar's; he immediately determines, Render therefore to Cæsar the Things that are Cæsar's &c. Now here, I am extremely at a Loss; and am forced to give over my Enquiries, without any Prospect of Satisfaction. Has the Doctor then found it out

at last; and is it no longer to be doubted, but that
p. 242. whoever has Power enough to coin Money, is always in full and lawful Possession, and ought to be look'd upon as GOD's Vicegerent? Then surely it will follow, that *Oliver Cromwell* had a Title to the Allegiance of the People of *England*; for it can never be denied, but he might have shew'd his Money to the Cavaliers, and ask'd them the same Question, which our Saviour did the Pharisees, whose Image and Superscription is this? And the Doctor cannot but be sensible, that he must admit of this Consequence, unless he will decline the Authority of *Grotius*, to whom he has manifestly appeal'd for the right Understanding of this Place of Scripture. For *Grotius*, in the very Place cited by the Doctor, (*Votum pro pace*) affirms, that his Allegiance was due only to the States of *Holland* and *West-Friseland*, and not to the States-General; To the former only, says he, I am sworn, and not to the latter, to whom the Military Men alone take Oaths of Obedience: And then he adds, as a Proof, that he own'd Subjection only to the States of *Holland* and *West-Friseland*, That if any one in our Time had shew'd our Money, and ask'd, whose is this Image? Any Man, both the Learned and the Unlearned, would readily have answer'd; The States of *Holland's*. Thus at length it appears, that our late Commonwealth, and even *Oliver Cromwell*, was no Usurper. But why then is the Doctor so angry with his Adversaries, when they tell him, his Arguments are as serviceable to that Tyrant, as to any of his Kings *de Facto*? Is there any one of their Objections, which he resents with greater Indignation, (*See his Defence*, p. 109, to 107.) than that which reproaches him with defending the Cause of *Cromwell*? Does not he tell them over and over,

over, that *Cromwell* had not the Supreme Power, or Sovereign Authority in England, and that it could never be prov'd, from his Principles, that the Obedience of the Subjects was due to him? How! Is it possible that the Doctor should so much forget himself? Is it not his avow'd Principle, (*View*, p. 89.) that the Coining of Money is a certain Mark of Sovereignty? That whoever has that Power ought to be obey'd by our Saviour's own express Direction? And is not this a good Proof of *Cromwell's* divine Authority? But the Doctor tells us (*Defence*, p. 106.) our Constitution is a sacred Thing too; and by that he is very confident, *Cromwell* could not be authorized to exercise any manner of Power; for he had not the Regal Title, to which alone, by our Laws, the Royal Office is annex'd; and besides he had never been recognized by the States of the Realm. But then it is evident p. 243. that our Constitution teaches us one Doctrine, and the Holy Scriptures another: And how can it then be true, that they entirely agree in obliging Subjects to obey those, who are in Possession of the Government, which the Doctor expressly affirms? (*View*, p. 89.) In a word, if the Power of Coining Money be a sufficient Token of the Divine Commission of the Person possess'd of it, it will not only follow, that *Oliver Cromwell* was a Lawful Governor, but that we had some Hundreds such at once in England, in King *Stephen's* Time: For a good Author tells us, That in those Days many Castles were erected in every County by the great Men; and that there were then in England as many Kings, or rather Tyrants as there were Lords of Castles, every one of them coining their own Money, and administering Justice to their respective Subjects. (*Will. Neobrigens. Rer. Angl. Lib. 1. c. 22.*)

Upon this Occasion I would intreat the Reader's Pardon, if I detain him a little upon the Subject of *Cromwell's* Authority, for it may be worth while to add some other Particulars, to convince the Doctor, that it will be hardly possible for him to prove *Cromwell* to have been an Usurper. His first Argument is this: 1. *Cromwell* had not, (says the Doctor, *Defence*, p. 106.) the Supreme Power, or Sovereign Authority of England. This is very strange! He exercised an absolute Sovereignty; he was courted by all Foreign Nations with Fear and Trembling; and the People of England, without Distinction, found it necessary to endure his Tyranny with Patience and Resignation. The late Transactions of these Twelve Years past (says *Chanc. Finch*, in *Cook's* Tryal) had involv'd so many Persons, that we could scarce find a Man, but he had need of the King's Mercy. And another

very eminent Writer (the late Bp. of Rochester, in his Answer to Sorbriere) has assur'd us. *That the whose Estates of the Crown, the Clergy, and most of the Nobility and Gentry, and indeed well nigh the whole Nation, were then at the Usurper's Disposal.* 2. We are told (*Defence, ubi supra.*) that Cromwell could not be a Lawful Governor, because he had not the Regal Title, to which alone by our Laws the Regal Office is annex'd. But this is likewise a vain Surmise; for our Histories furnish us with Instances, that the Regal Office has been sometimes lawfully exercised, without the Regal Title; which I before (P. 51.) observ'd to be the Case of Maud the Empress; and we are certain, our Laws have conferred the Title of King, without annexing to it Sovereign Power. Thus the eldest Son of Henry II. was crowned King of England in his Father's Life-time; and yet he remained in the Condition of a Subject. King Richard II. when he had determin'd that Robert, Earl of Oxford (who also was Marquis of Dublin, and Duke of Ireland) should be created King of Ireland, questionless did not doubt, but that he himself in the mean while possess'd that Island by as good a Title, although he was only styl'd Lord thereof. (These are Mr. Selden's own Words in his *Mare Clausum*, B. 2. c. 19.) And when Henry VI. had created Henry Beauchamp, Duke of Warwick, King of the Isles of Wight, Guernsey, and Jersey (Mr. Selden, *ibid.*) it was never disputed, but he still retain'd the supreme Dominion over those Islands. 3. The Doctor adds (*Defence, ibid.*) that Cromwell had never been recogniz'd by the States of the Realm. A Confession, that if this had happen'd, he would then have been a Lawful Monarch. And what is this, but attributing to the Three Estates a Power of Deposing Kings, as hath been abundantly prov'd already? After this plain Acknowledgment, the Doctor may inveigh against Republican Principles, as long as he pleases, but he has certainly subjected the Rights of the Kings to the Will of the People.

Let not the Doctor be offended, that I apply the Name of People to the States of the Realm; for in their highest Capacities they are but the People's Representatives; and when all is said, the greatest Peers are but the greatest Subjects: And if they are no more than so, I wish the Doctor wou'd shew us, where he finds it in our Constitution, that the Subjects can transfer their Allegiance whensoever they think it proper. To bring this Matter to a Point, I should be glad to learn from the Doctor, whether the Parliament which declared Richard II's Throne

VACANT,

VACANT, and placed *Henry IV.* in it, were Subjects, or not. The Doctor cannot but be sensible, that the Power he ascribes to the *States of the Realm*, will depend upon the Resolution of this Question; and therefore it is to be hoped, he will take it into Consideration. Now tho' the Doctor will find this Opinion of his very artfully supported in the learned Writings of *Buchanan*, *Milton*, and *Johnson*, yet I must not conceal from him, that the House of Commons of 1642, may justly claim the Honour of first setting this Doctrine in its true Light, and they endeavour to prove it from the Eleventh of *Henry VII.* I shall set down the whole Matter, as I find it in *Rushworth's* (Part. 3. Vol. 1.) Collections, and leave it to the Doctor, to form his Speculations upon it. King *Charles I.* (*Answer to the Declaration of the Parliament*, May 4. 1642.) recommends to his loving Subjects (in order to inform themselves, what their Duty was to him in those difficult Times) the careful Perusal of the Statute of the Eleventh of *Henry VII.* which required their Attendance on the King in his Wars, as an indispensable Part of their Allegiance; and so order'd it, that the said Statute was reprinted by it self, and dispersed about the Kingdom. The House of Commons finding themselves concerned to prevent the dangerous Operation of that *Act of Parliament*, soon after resolv'd upon a Remonstrance for their Justification, and they likewise particularly advise their Friends (May 26. 1642.) to take great Notice of that Statute, as a proper Rule for their Conduct and Behaviour, in the following Words: 'That all Men may the better know their

p. 246.

'Duty in Matters of that Nature, and upon how
'sure a Ground they go, that follow the Judgment of Par-
'liament for their Guide; we wish them judiciously to con-
'sider the true Meaning and Ground of that Statute, made
'in the eleventh Year of *Henry VII.* cap. 1. which is prin-
'ted at large at the End of His Majesty's Message of the
'Fourth of May. This Statute provides, that none that shall
'attend on the King, and do him true Service, shall be at-
'tainted, or forfeit any thing. What was the Scope of
'this Statute? To provide that Men should not suffer as
'Traitors for serving the King in his Wars, according to
'the Duty of their Allegiance? If this had been all, it had
'been a very Needless and Ridiculous Statute. Was it then
'intended (as they may seem to take the Meaning of it to
'be, that caused it to be printed after His Majesty's Mes-
'sage) that they should be free from all Crime and Penalty,
'that should follow the King, and serve him in War, in

'any Case whatsoever, whether it were for, or against the
 'Kingdom, and the Laws thereof? That cannot be; for
 'that cannot stand with the Duty of their Allegiance, which
 'in the Beginning of this Statute is express'd to be, to
 'serve the King for the Time being, in his Wars, for the
 'Defence of him and the Land; and therefore if it be
 'against the Land (as it cannot be understood to be other-
 'wise, if it be against the Parliament, the Representative
 'Body of the Kingdom) it is a Declining from the Duty
 'of Allegiance (which this Statute supposeth may be done)
 'tho' Men should follow the King's Person in the War:
 'Otherwise there had been no need of such a Proviso in the
 'End of this Statute, that none should take Benefit there-
 'by, that should decline from their Allegiance. That,
 'therefore, which is the Principal Verb in this Statute, is
 'the serving the King for the Time being, which cannot be
 'meant of a *Perkin Warbeck*, or any that should call himself
 'King, but such a one as, whatever his Title might prove,
 'either in himself or his Ancestors, should be received and
 'acknowledged for such by the Kingdom, the Consent
 'whereof cannot be discerned but by Parliament, the Act
 'whereof is the Act of the whole Kingdom, by the Personal
 'Suffrage of the Peers, and the Delegate Consent of all the
 'Commons of *England*. And *Henry VII.* a Wise King,
 'considering that what was the Case of *Richard III.* his
 'Predecessor, might, by Chance of Battle, be his own;
 'that he might at once, by such a Statute as this, satisfy
 'such as had serv'd his Predecessor in his Wars, and also
 'secure those that should serve him, who might otherwise
 'fear to serve him in the War, left by Chance of Battle
 'that might happen to him also (if a Duke of
 p. 247. 'York had set up a Title against him) which had
 'happen'd to his Predecessor; he procured this
 'Statute to be made, that no Man should be accounted a
 'Traitor for serving the King in his Wars for the Time be-
 'ing, that is, which was for the present allow'd and receiv'd
 'by the Parliament, in behalf of the Kingdom. And, as
 'it is truly suggested in the Preamble of the Statute, it is
 'not agreeable to Reason, or Conscience, that it should be
 'otherwise, seeing Men should be put upon an Impossibility
 'of knowing their Duty, if the Judgment of the Highest
 'Court should not be a Rule and Guide to them. And if
 'the Judgment thereof should be followed, where the Que-
 'stion is, Who is King? Much more, What is the best
 'Service of the King and Kingdom? And therefore those
 'that shall guide themselves by the Judgment of Parlia-
 'ment,

ment, ought, whatever happens, to be secure and free from all Account and Penalties, upon the Grounds and Equity of this very Statute.' To the same purpose they argue against the King, and defend this their Exposition of the 11th of *Henry VII.* in a following Remonstrance, Nov. 2. 1641. in these Words. 'God be thanked, the Case is not now, as it was at the Time when this Statute, viz. 11th of *Henry VII.* was made to secure his Subjects from that continual Uncertainty and Danger they were exposed unto, in respect of the different Titles of *York* and *Lancaster*; the one prevailing one while, and the other another time: And therefore by this Statute it was provided, that whosoever should serve the King for the Time being (whatever his Title may prove) should be free from all Crime and Penalty. So that whomsoever the Parliament had at that Time received in the behalf of the Kingdom, he must undoubtedly have been accounted the King for the Time being, and consequently the People secured in following him, tho' another, and haply a better Title, had been set up against him (as if there had been a True Duke of *York* living, a better might have been set up against him, *Henry VII.* than his own :) We say then, as we said before, if it be against Reason and Conscience, that Men should suffer, that guide themselves by the Judgment of the highest Court, which is also the Representative Body of the whole Kingdom; and if in this Statute the Parliament is made Judge in the Question, Who is King? Much more are they to be Judge in the Question, What is the best Service of the King and Kingdom? And they ought to be free from all Crime and Punishment, that follow the Judgment thereof upon the very Grounds and Reasons of this Statute, which we do agree, his Majesty's good Subjects may read with Comfort; because it lays down a Ground, which delivers them from Uncertainty in their Obedience, in the difficultest and highest Cases whatsoever.' From these Extracts the following Remarks will be obvious.

1. That the present Construction of the 11th of *Henry VII.* so much insisted upon by many eminent Writers soon after the Revolution, and now again lately by Dr. *Higden*, was of old urged, and published as Law, by that Parliament, which took up Arms against the King. I will not say they were the first that ever expounded this Statute in favour of Kings *de Facto*; for I think my Lord *Bacon* had before deliver'd his Opinion to that purpose: But I may boldly affirm, that none had ever taken so much Pains to

clear and establish the true Sense of it, by such solid and weighty Arguments, as those brave Assertors of the Rights and Liberties of the People of England. 2. They assure us, it was Part of our Constitution, that *whoever should be set up or owned by the Parliament as King, tho' another, and haply a better Title, should be advanced against him; (which might have been the Case of Henry VII. had the true Duke of York been then living;)* he ought undoubtedly to be accounted the King for the Time being, within that Statute. And the Reason they assign for these Doctrines, is worth observing. Is it not agreeable (say they) to Reason or Conscience, that it should be otherwise, seeing Men should be put upon an Impossibility of knowing their Duty, if the Judgment of the Highest Court should not be a Rule and Guide to them, &c. Thus then it is evident, that all those momentous Points of Law, which the Doctor has labour'd so much to defend in his View, were long since advanced, and asserted to his Hand, by that Learned Assembly of True Patriots, who began the Civil War against King Charles I. The true Meaning of Henry VII's Statute could not escape the Penetration of that Judicious Body; they took care then to publish their Sense of it; and I have now, with great Fidelity, transcribed it for the common Benefit. Here we see the Doctor's Principle publickly embrac'd by the Representatives of the Nation; Allegiance is declared to be due to Kings *de Facto*, by Virtue of the 11th of Henry VII. and not to all Kings *de Facto* neither, but only to such as shall be receiv'd and

F. 249. *acknowledged by Parliament, or, as the Doctor chooses to express himself, shall be recognized by the States of the Realm.* It must be confess'd however, this Doctrine is liable to some Objections, which it may become the Doctor to remove; and therefore I shall beg Leave to propose them to him. 1. It may be said, that when King Charles I. drew up his Answer to that Remonstrance of the House of Commons, in which they first vented their Exposition of the 11th of Henry VII. he takes Notice of it, as New and Singular, and never before heard of. They proceed (says the King) in the Spirit of Declaring to certify our Subjects in the Mistakings, which near 150 Years have been receiv'd, concerning the Statue of the 11th of Hen. VII. cap. 1. (a Statute our good Subjects will read with Comfort) and tell them, that the Service of the King for the Time being, cannot be meant of Perkin Warbeck, or of any that shall call himself King, but of such a one as is allowed and received by the Parliament in behalf of the Kingdom, &c. Here it is plain the Good King (who did nothing without the

the Advice and Consent of his Council,) wonders at the Construction given by the *Commons*, of this *Statute*; he recites it only with an Intention to expose it; and thinks it a sufficient Argument against it, that a different Opinion had universally prevail'd, ever since the first making of that Statute. Now I am apt to think, the Doctor will be a little surprized to find, a Judicious Prince so ignorant of our *Constitution*, as to treat with Contempt that very Opinion, which the Doctor has taken so much Pains to prove, will do the greatest Honour to our Country, and is the noblest Indication of its Wisdom. 2. We have likewise the Testimony of a very eminent Lawyer against the Doctrine of the *House of Commons*; and this he deliver'd in a Court of Justice at the Tryal of one of the *Regicides*. See p. 250. Several of them pleaded the 11th of *Henry VII.* in their Defence; and particularly Colonel *Martin* had so good an Opinion of the Authority of that Statute, as expounded by the foremention'd Parliament, that he plainly intimated, *a Parliamentary Title was the best King Charles II. had.* This Piece of Confidence was so highly resented by the *Solicitor General* (afterwards *Lord Chancellor Finch*) that then was, that he made the following Answer. *My Lord, this Gentleman, the Prisoner at the Bar, hath entered into a Discourse, that I am afraid he must have an Answer for in Parliament. He hath owned the King; but thinks his best Title is the Acknowledgment of the People, and he that hath that, let him be who he will, hath the best Title.* Now this is *Point blank* against the Doctor's Assertion; for nothing is more evident, than that this *Great Man* was extremely offended with the Position, that a *Parliamentary Title* was the best a King of *England* could have. But certainly this is what the Doctor maintains; for he affirms, that the *Recognition of the States of the Realm* is sufficient to make a Lawful King, and then it must be sufficient to supersede a Title by Birth, and consequently is the *best Title*.

I return now to the Doctor's Argument from our *Saviour's* Answer to the *Pharisees*, upon Sight of the *Tribute Money*. I have shew'd him the ill Consequence of *Grotius's* Exposition of that Place; and would now recommend some farther Difficulties to his Consideration, which may be objected against that *Learned Man's* Opinion. The Truth is, when a Text is capable of various Interpretations, and able Commentators are divided in their Sentiments about its true Meaning, it is a little too arrogant in the most applauded Writer, to think to impose his own Conjecture upon his Reader, before he has satisfied him, that

that the Attempts of others have really fail'd of Success,

Thus it is with *Grotius*; he abounds in his own
 p. 251. Sense, in the Explication of the Passage now before us, without pretending to confute the different Solutions, which have appear'd plausible to other Judgments; and I may appeal to Dr. *Higden* himself, in the Question now under Consideration, whether that Learned Annotator has produced one Argument, by Virtue of which it is more reasonable to be of his Persuasion, than of theirs from whom he differs. Let us examine this Matter more at large. 1. Some have been of Opinion, that our *Saviour* did not in these Words teach, that *Tribute* was to be render'd to *Cæsar*; 'Tis only, say they, a general Precept of giving to *God and Cæsar* their Due, without determining particularly, what their Right was. It may, it is true, be objected, that then our *Saviour's* Answer was evasive, and not at all to the Question; but this gives them no Disturbance; for considering the insidious Intention with which the *Pharisees* put this Question, they are of Opinion, it was highly Consistent with his Prudence to return such an Answer, as would rather silence them, than satisfy their Doubt; and this is said to have been Mr. *Calvin's* Notion. In Defence of which they add, (*See the Exercitation concerning Usurped Powers, printed 1650.*) that if our *Saviour* had expressly enjoin'd the Payment of *Tribute to Cæsar*, in this Answer, which was utter'd publickly, and before a great Multitude in the Temple; his Adversaries could not have had the Impudence, a few Days after, to accuse him before *Pilate*, as one that perverted the Nation, and forbad to give *Tribute to Cæsar*: For tho' there was no sort of Villany, that their Malice would not have prompted them to commit, in order to destroy him; yet they must have had too much Regard to their own Interest and Safety, to charge him with what so many knew to be a Slander. 2. Others think our *Saviour* did give a direct Answer to the *Pharisees*; but then they say, it will by no means follow, that he enjoined Obedience to all *unlawful* and *usurped* Powers; for his Command extended no farther, than to the Payment of *Tribute*; which may be due to ambitious, warlike, and dangerous Neighbours, rather as a wise Expedient to prevent a total Subjection, than as a necessary Consequence and Effect of it. In this Case it is not material, whether the Prince, that demands *Tribute*,

p. 252. has a Right to it, or no; because they that pay it, are supposed to consider only his Power of Injuring and oppressing them, which they are not able

able to oppose; and therefore may lawfully compound for their Security, by offering a Part, in order to save the Remainder. Now the *Jews*, at the Time we are speaking of, were really a Conquer'd People; their Country had been reduced into the Form of a *Roman Province* by *Augustus*, and was entirely at his Mercy; but his Indulgence to them was remarkable; he permitted them to govern themselves by their own Laws; and allow'd them Privileges seldom granted to a Vanquish'd Nation; in Return for which mighty Favours, he was contented with an Annual Tribute, which they had all imaginable Reason to submit to. They knew very well, they had formerly paid Tribute to the *Egyptians*, the *Persians*, and the *Macedonians*; and therefore had no Pretence to be scrupulous, now it was exacted from them by the *Romans*. 3. Another Reason assign'd, why our *Saviour* required the Payment of *Tribute* to *Caesar*, was, because he had a good Title to the Obedience of the *Jews*, by Virtue of their entire Submission, and Surrender of their Government to the *Romans*. This was the Opinion of Mr. *Selden*, (*De Jure Nat. sec. Hebræos*, l. 6. c. 17.) and Dr. *Hammond*. They were persuaded, that the *Jews* had put themselves under the *Roman* Protection, and bound themselves to the Payment of *Tribute*, and all other customary Acknowledgments, due from subordinate States and Principalities to their Sovereigns: That for this Reason our *Saviour* called for the *Tribute Money*, that by the Sight of the *Image and Superscription*, they might be convinced, how unreasonable their Pretensions to Liberty were, after so plain and manifest a Resignation of it, as then appeared to their View. For, in the Opinion of those learned Men, this *Tribute-Money* exhibited undeniable Tokens of the *Roman* Authority over them, and plainly determin'd the Question against them. Thus we see here are Three Expositions of our *Saviour's* Answer, much different from that of *Grotius*; for he supposes that *Caesar* was an *Usurper*; and that our *Saviour* reprehended the *Pharisees* for not submitting to him, tho' he was so, and no better: But of those, I have now recited, two of them have no Relation to the Title of the *Roman Emperor*; and p. 253. the last plainly asserts it to be good and unquestionable. Now, if these Opinions are really absurd, and untenable, and by no means fit to be countenanced, in Comparison with that of *Grotius*; let them fare as they deserve; but surely we owe them that Justice not to condemn them before Examination. On the other hand, it is most certain, that *Grotius's* Opinion is liable to great Objections,

Objections, which I shall now propose to the Doctor's Consideration. 1. It is plain from our *Saviour's* Answer, that he did not desire, the *Jews* should do more for *Cæsar*, than was consistent with the common Principles of Right and Justice: He bids them *give unto Cæsar the Things that be Cæsar's*; that is, give him what is his Due, what he may lawfully Claim, and what you your selves must allow to belong to him, by your own avow'd Maxims and Rules of Equity. He did not pretend to give them any new Laws, by which they should judge of the Titles of Princes; but plainly refers them to those already in Being for their Direction; and consequently, it is not possible to explain our *Saviour's* Meaning according to *Grotius's* Imagination. For where shall we find in the *Old Testament* the least Instance of GOD's obliging People to be subject to Usurpers? Or how can it be proved, that the Laws of Nature have made it their Duty? It is true, great Endeavours have been used to pass this Deceit upon the World; and Dr. *Higden* has thought it worth his while, to transcribe some of the common Arguments urged for that Purpose; but the Fallacy is easily detected, and has been sufficiently made to appear, to the satisfaction of reasonable Men. Had our *Blessed Saviour* established the Rights of Princes on any different Foundation, than what they stood upon before; his Will, in a Matter of so great Consequence, would have been clearly reveal'd, and the *Evangelical* Writings would have borne Witness to this Truth, in Terms that could not be controverted: But that Confidence has hitherto proved vain, which has pretended to

P. 254. any such Discoveries; and indeed, had the *Gospel* introduced any such Innovation as this, the Nature of *Civil Rights* must consequently have been changed; and it would not have been true, which the Doctor himself confesses, that our *Blessed LORD* made no Alteration in *Matters of Government*; but left the Governments of the World as he found them. (View p. 88.) 2. The Fact upon which *Grotius* founds his Argument, seems plainly to be mistaken by him. He would persuade us, that *Tribute* was due to *Cæsar*, because he was in Possession of *Judæa*; and to prove his Possession, he alledges his *Coining* of Money there, as an indisputable Mark and Token of it: But he should have consider'd, that amidst these great Changes, which befell the *Jewish* Government, they still retain'd the Power of *Coining* their own Money; and never lost it till the final Destruction of their City under *Vespasian*. Neither was this a Favour allowed only to the *Jews*; for there was hard-

ly a City of Note, in the Eastern Part of the Empire, which did not enjoy the same Privilege; as those who are but moderately skilled in this kind of Learning, are able to bear me Witness. A little Insight into the Cabinets of the Medalists will shew, that the *Roman Emperors* were well enough contented, their conquer'd Subjects should coin their own Money at their Pleasure; especially if they took Care to adorn it with their Images, and did not forget to compliment them, upon extraordinary Occasions, with *Inscriptions* to their Honour: So that if the Extent of the *Roman Power* and Dominion were to be inferred only from the Number of *Mints*, which were managed by their own proper Officers; we should soon reduce it into a very narrow Compass: And our *Saviour's* Answer, instead of proving that *Tribute* was due to *Cæsar*, would serve to a quite contrary Purpose; that is, it would plainly shew, the *Jews* were a *Free People*, under no Obligations of Obedience to any foreign Potentate. If it should be said, that the *Tribute-Money* having *Cæsar's Image* upon it, could not be struck by the *Jews*, their Law absolutely forbidding them to employ themselves in any Works of that Nature: (J. Seld. de Jur. Nat. juxta Hebræos) I answer; it will not from thence follow, that the *Romans* did actually coin that Money in *Judæa*, with which their *Tribute* was paid; for the *Jews* might furnish themselves with a sufficient Quantity of Money for that Occasion, by Exchange and Commerce, as well as if a *Mint* had been set up on purpose in *Jerusalem*, for the Coinage of *Roman Money*. Besides, every one of the *Jews* (who were dispersed throughout all Parts of the *Roman Empire*) being obliged by their Law to pay yearly to the *Temple* a Piece of Money; the greatest Part of this Sum was undoubtedly returned in *Roman Money*, which would sufficiently enable them to pay their Civil *Tribute*; and perhaps this was a great Part of the Employment of the *Money Changers*, which our *Saviour* drove out of the *Temple*, *Matth. xxi. 12. 3.* *Grotius* was not always of this Opinion. In his Annotations, indeed, upon the *Gospels*, he seems extremely fond of it; but in his famous Book *de Jure Belli & Pacis* (Lib. 2. c. 16. Sect. 17.) in that very Passage cited by the Doctor, he pretends only, that Possession confers a Title in controverted and doubtful Cases; and urges this Answer of our *Blessed Saviour* to prove it; a Matter, which no reasonable Man will ever contest; that Maxim in Law being universally received, that *in rebus dubiis melior est conditio possidentis*. But in his Notes on the

Old Testament (which may justly be look'd upon as the final Resolution of that great Man in several Instances) he clearly disapproves of that Opinion, which affirms *Right* to be the inseparable Attendant on *Possession*; and asserts the contrary. Thus, upon these Words of the Prophet

p. 256. *Jeremy* [Jerem. xlix. 1.] *Concerning the Ammonites, thus saith the LORD, hath Israel no Sons? Hath he no Heirs? Why then doth their King inherit Gad, and his People dwell in his Cities?* *Grotius* remarks, that they were a clear Determination for *Hereditary Right* against *Possession*. From hence (says he) we learn, that alibo' it is said, that whoever makes himself Master of any Country by Force of Arms, is by the Law of Nations the true Lord and Proprietor of it; yet if the War be unjust, neither the Conqueror, nor those that are under him, are acquitted before GOD. What can the Doctor's Adversaries desire more, than this Concession of *Grotius*? Is it not from hence plain, that *Possession* against an Antecedent Title will not create a *Right*, which is all they contend for? 4. This Opinion, that wherever any Person has Power enough to coin Money, he is a Lawful Possessor; must needs have proved so fatal to the Roman Empire, that had it been the Christian Doctrine, for that Reason alone, the Professors of it would have been treated with the utmost Rigour and Severity, as Enemies to *Cæsar*, and the most dangerous Promoters of Sedition and Rebellion; for considering the Multitude of Coining Offices throughout the Imperial Dominions, it was hardly possible for any Rebel to be so unfortunate, as not to be Master of a City, which had a *Mint*; and then he had nothing else to do, but to stamp his Image on his Money, in order to become a Lawful Proprietor. But among the great Number of Crimes charged upon the Christians, which are carefully recorded by the Primitive Apologists, we no where find, that they were accused upon this Article: On the contrary, to the no little Confusion of those, who advance this Notion, *Tertullian* has expressly assured us that they abhorred this Doctrine; for in his Remonstrance to *Scapula* the Roman Governor, he alledges it as an Instance of the Christian Loyalty, that no Man could accuse his Brethren of being *Albiniani*, *Nigriani*, or *Cassiani*; that is, that they had been Adherents to *Clodius Albinus*, *Pescennius Niger*, or *Avidius Cassius*; the two first

p. 257. of these were Governors of great Provinces, had numerous Armies at their Command, and were elected Emperors by them; and all of them coined Money with their Images upon them, and the Inscription of *Imperatores* and

and *Augusti*, as is well known to those, who are any thing curious in these Studies, and may be seen in *Mediobarbus*, and other Authors, who treat upon the Subject of *Medals*. Is it not then evident, that the Christians of those Times had not learnt this Doctrine of Paying Allegiance to those, who were in *Possession*, and could shew their *Images on their Money*? Had they understood this to have been the Will and Command of our *Saviour*, they could not have been so stupid, as to boast of their Disowning the Authority of *Pescennius* and *Albinus*, who were as much in Possession of two great Parts of the Empire, a *Septimius Severus* was of a third; but the *Senate* having declared for *Severus*, and required them to obey him only as their *Emperor*, they could not be look'd upon after that, by the *Constitutions* of the *Empire*, as any other than *Usurpers* and *Rebels*. (*H. Grotius de Jure Belli et Pacis*. l. 2. c. 9. Sect. xi.) This was likewise the Case of several other Generals, and Governors of Provinces, who revolted from their Obedience. *Carausius* and *Allectus* were successively Masters of our *Island*, were proclaimed *Emperors* by their Armies, and assumed the Title of *Augusti* in their Coins, which are frequently dug up in this Kingdom; but by the *Roman* Laws they were Traitors; and as such were condemned by all honest Subjects. Now the Question is, how the Christians, who lived under these pretended *Emperors*, should behave themselves. By our *Saviour's* Law, says the Doctor, they owed Obedience to *Carausius* and *Allectus*, for they were in Possession of *Britain*, and could have shewed Money with their *Image and Superscription* upon it, which sufficiently demonstrated their Right; but by the established *Constitution* of the *Roman* Government, they were no better than *Rebels*; and whoever assisted them, were guilty of the same Crime. Thus, as the Doctor has contrived it, p. 258. the Christians of those Ages must have been of all Men the most miserable in this World; the Laws of their *Saviour* obliged them to one Thing, and those of the *Empire* to another. By what Expedient will the Doctor now relieve us under these Difficulties? Either we must be govern'd absolutely by the Laws of CHRIST; or we are bound to obey the *Civil Constitutions* of the Country where we live: If the first is true, then it seems we are to be subject, and swear *Allegiance* to any one, who can shew his *Image* on his *Coin*; but then it will follow, that there never was an *Usurper* in all the Time of the *Roman Empire*: Then it will be false, that our *Blessed Lord* intended to make no Change in the Government of the World, which the Doctor thinks an important Truth; (See the Preface to his Defence.)

And

And then lastly, to the eternal Reproach of those, who have embraced his *Gospel*, we have found an Instance of a *Christian Law*, which never had any Authority in a *Christian Nation*. But if we are to be govern'd by the *Civil Constitutions* of our Country; and it was never our *Saviour's* Design to destroy their Obligation; to what Purpose then did he give his Disciples a Law, which he knew could never be observed? And to what End has the Doctor urged it, against the known Practice of this Kingdom, as well as that of the *Roman Empire*? For the Proceedings against the *Regicides*, and those who had adhered to *Cromwell*, are good Evidences, that our *Saviour's* Doctrine was never thought to be in Force here; and the Reasons I have mention'd, may be sufficient to prove, it had as little Authority elsewhere. But to put this Matter out of Dispute, in Relation to the *Roman Empire*, I shall beg Leave to put the Doctor in Mind of the Story of the Tyrant *Maximus*, and that in the Words of a very learned and judicious Writer. (*The Author of The Title of a thorow Settlement examined, in Answer to Dr. Sherlock's Case of Allegiance, p. 77. &c.*) ' *Maximus*, after the Murder of *Gratian*, was ' in full Possession of the Western Empire; for *Valentinian* ' left *Italy*, and fled to *Thessalonica*, with his Mother, and ' *Probus*, the *Præfectus Prætorii*; so that *Maximus* had the ' Government of all the West in his Power. St. p. 259. ' *Ambrose* was at that Time persecuted by the ' Empress *Justina*, she being an *Arian*; and *Maximus* pretended to make War upon her Son *Valentinian* ' in his Behalf; yet no Man was more against the Proceedings of *Maximus*, than St. *Ambrose*: and in the Negotiations he twice had with him, he maintain'd *Valentinian's* Cause with all the Freedom and Courage that became a Christian Bishop. I know we have been told, that ' all the Bishops of the West, not excepting the great St. Martin, who was called the Apostle of France, made their Applications to *Maximus*, and followed his Court, as much, if ' not more, than they did any Prince's of that Age. But it ' is worth taking Notice of, that these Bishops are much ' blamed for it by *Sulpicius Severus*; he says, they were notorious for their base and servile Flattery; and he gives ' such a Character of *Ithacius*, one of the chief of them, as ' I wish no other Bishop may ever deserve. But St. Martin ' was of another Temper; he frequently refused to accept ' of his Invitations to his Table; because he had deprived one ' Emperor of his Life, and another of his Kingdom; till at last, ' when *Maximus* had made the best Excuse he could, ca-

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' fling all the Blame upon the Soldiers, who had forced
 ' him to take upon him the Empire; and pretending, there
 ' was something more than humane in it; St. Martin did
 ' condescend to sit at the Table with him; and he at all
 ' Times hinder'd him, as much as he could, from doing
 ' Mischief, and from breaking in upon the Privileges of the
 ' Church; which was not owning his Authority: For as
 ' *Sulpicius Severus* informs us, he rather demanded, than
 ' petition'd for what he asked of him. But as the same Au-
 ' thor represents him, *Maximus* wanted nothing but a good
 ' Title, to make him an excellent Emperor; and St. Mar-
 ' tin was willing to make the best Use of him he could,
 ' for the Benefit of the Church. After the Deaths of Ma-
 ' ximus and *Eugenius*, St. Ambrose says of them, *that they*
 ' *were both in Hell, teaching, by their miserable*
 ' *Examples, how sad a thing it is for Subjects to* p. 260.
 ' *take up Arms against their Prince; of whom it*
 ' *is fitly said, I have seen the Wicked exalted, and lifted up*
 ' *above the Cedars of Libanus; and I passed by, and behold he*
 ' *was not; for the Righteous Man (meaning Theodosius and*
 ' *Gratian, whom he just before mention'd) passed from the*
 ' *Darkness of this World into Light Eternal; and the Wicked*
 ' *was not, who hath ceased to be unjust.* Which must neces-
 ' sarily suppose, that *Maximus* and *Eugenius* were as guilty
 ' in retaining, as in acquiring their unjust Possessions; and
 ' that they ceased not to be unjust, till they died, and were
 ' no more in this World. It had been strangely uncharitable
 ' to have said, that they were *both certainly damned*, because
 ' they had rebelled some Years before their Deaths; if
 ' afterwards they became Lawful Emperors, and had so
 ' long Space for Repentance: But he supposed them to
 ' live and die in continual Usurpation, and therefore to be
 ' tormented in Hell after Death, as Usurpers and Rebels.
 ' Our Countryman *Gildas* too (*De excidio Britanniae*) gives
 ' such a Description of *Maximus*, as makes him no better,
 ' than an Usurper, from the Beginning to the End of his Go-
 ' vernment; he says, *he was advanced against Law, without*
 ' *any Title, or in a Tyrannical Manner; that he strengthen'd*
 ' *himself by Lies and Perjury, and continued his Usurpation by*
 ' *the Murder of Gratian, and the Banishment of Valentinian,*
 ' *and was the same unjust Usurper to his Death.* *Zozimus* indeed
 ' says, (l. 4.) that *Theodosius* had consented, that *Maximus*
 ' should be acknowledged Emperor; and commanded his
 ' Statues to be set up, that he might, under a Shew of
 ' Kindness and Friendship, have the better Opportunity
 ' to ruin him; but this is against the Authority of all-
 ' other

other Historians; and *Zosimus* never omits any Occasion to defame the Christian Emperors, and particularly *Theodosius*: And besides his Hatred to Christianity, which he exactly copied from *Eunapius*, whose History he is said to abridge; he is singular in other Circumstances, relating to this very Story.

But it is more material to observe, that
p. 261. *Theodosius* declared all the Laws and Edicts of *Maximus* to be of no Force or Authority; and

that this was no more, than the Christian Emperors used to do in such Cases. Which implies, that the Christians did not think, Tyrants and Usurpers received any Authority from GOD; for if they had, all their Acts, which had been according to Natural Right and Justice, must have been valid, as being made by such as had GOD's Authority to enact Laws, and decree Justice; and it would have been sinful to declare them void *ab initio*, and of no Effect. For if GOD had empower'd them to act as Emperors against the standing Laws and Constitutions of the Empire, he had authorized them to give out Edicts and Decrees, which must have been as obligatory in Conscience, as those of the lawful Emperors themselves; and whatever they wanted of the Formality of Law, ought to have been supplied by the lawful Emperors; and not all their Acts to have been declared invalid, and never to have been of any Authority or Obligation. *St. Ambrose* was not the Bishop, who would tamely have seen GOD's Authority in his Vicegerents thus despised; but *Theodosius* would have found him the same Man, that he did upon some other Occasions, if this had been the Doctrine of the Church." Thus that worthy Author has very accurately shewn, that the Christians did not look upon *Maximus*, as any other than an Usurper, notwithstanding the Extent of his Dominions, and the Greatness of his Power: And he proceeds to prove, they had no better Opinion of *Eugenius*; though he was much superior to *Theodosius* in Strength. I would humbly offer it to be considered, whether our Saviour's Answer to the *Pharisees* would not be more intelligible, and the Force of his Argument better understood, if we should say, the Money he demanded a Sight of, was coined by the *Jews* themselves? For then we may conceive,

he reason'd with them after this Manner: 'Do

p. 262. 'you pretend to question the Lawfulness of Paying Tribute to *Cæsar*, who have stamped his Image upon your Coins for that Purpose, after the Custom of Conquer'd Countries? You, who have been scrupu-

lous

' lous in paying this Compliment to the best of your Princes,
 ' and yet are now guilty of a viler Submission, than any
 ' others of the *Roman* Subjects. Behold here your own Act
 ' and Deed, your own Money witnesses against you, and de-
 ' termines the Controversy: For how came *Cæsar's* Image up-
 ' on your Coin, if you have not acknowledged him for your
 ' Sovereign? And if he is your Sovereign, why should you
 ' scruple to pay him Tribute? *Render therefore to Cæsar*
 ' *the Things that be Cæsar's, &c.*" In Favour of this Conje-
 ' cture I have already cited the Opinion of very learned
 Men, who have been willing to own, that the *Jews* were
 allowed the Liberty of coining their own Money by the *Ro-*
mans; but it must be confessed, they are much of a Mind,
 that it was not consistent with their Laws to stamp any Hu-
 mane Effigies upon it; and consequently they think it neces-
 sary to affirm, that the *Tribute-Money* was struck by the *Ro-*
mans themselves. Now, with all due Submission to better
 Judgments, I see no sufficient Evidence for this Assertion:
 For, *First*, If their Law which forbids the Making of any
Graven Image, or any Likeness of any Thing that is in Heaven
above, or that is in the Earth beneath, or that is in the Water
under the Earth; (Exod. xx. 4.) if this Law, I say, must be
 understood absolutely, without any Limitation; then *Aaron's*
Rod, and the *Pot of Manna*, or *Incense*, which are found
 upon the *Jewish Sicles*, were illegal Images, and then, if
 they could dispense with themselves in this Point, why might
 they not as well allow themselves the Liberty of Stam-
 ping *Cæsar's* Image on their Coin? *2dly*, If we consider the
 End, for which the *Jews* were forbid by their Laws to
 make any *Graven Images*, it will follow, that it was equally
 unlawful for them to purchase or possess any *Images* already
 made by others; for why were they prohibited to make
 any *Graven Images*, but only lest they should worship them as
 the Heathen did? And can it then be denied, but
 the same ill Consequence might follow, if they p. 263.
 were allowed to admit and retain in their Houses
 such only, as were the Workmanship of foreign Artists?
 Besides, GOD had as strictly forbidden the Possession of *Ima-*
ges, as he had the Making of them; for his Commands are
 peremptory, that in all their Conquests over the Heathens,
 they should be sure to burn their *Pictures*, and destroy their
graven Images. (Exod. xxxiv. 13. Numb. xxxiii. 52. Deut.
 vii. 5.) What shall we say then to this Case of the
Tribute-Money, which had *Cæsar's* Image upon it, and yet
 was as much handled and used by the *Jews*, as any of their
 own *Sicles*? Is it not then plain, they had no Scruple in
 carrying about with them their *Emperor's* Images on their
 Coins?

Coin? And why then should it be held unlawful for the like Money to come out of their own Mint? We are farther encouraged in this Opinion by the Testimony of the *Jewish* Doctors, who agree, that even *Statues* themselves (which certainly are more liable to Objection, than bare Heads upon Medals, and those only *in Profile*) were allowable in the Houses of the *Jews*, provided they were kept only for Ornament-sake, as Pieces of Household-Stuff, and not upon a Religious Account. And therefore *W. Schikard* (an Author well esteem'd of for his Knowledge in the *Jewish* Customs) has for this very Reason defended the Lawfulness of their stamping an Image upon their Coins; and he informs us, that those very *Rabbins*, who would not permit the Possession of entire *Statues*, would yet allow of such *Sculptures*, as had only a Head or Face upon them. *Josephus* indeed seems to be of a contrary Opinion, as if all manner of *Images* were utterly prohibited by the Divine Law, and it were unlawful for a *Jew* to be so much as the Owner and Possessor of them. But Mr. *Seldon* (de Jur. Nat. & Gent. l. 2. c. 8.) has observed, that *Josephus* herein, as he does upon many other Occasions, differs from the *Talmudical* Doctors, and therefore his Authority is not great among the *Jews*: Besides, when all the Passages which are urged from his History, upon this Controversy, p. 264. are duly consider'd, they will be found only to prove, that such *Images* were never to be endured within the *Jewish* Government, which were originally intended for Idolatrous Uses; or were purposely form'd and erected to do Dishonour to the GOD of *Israel*. Thus for instance, *Josephus* tells us, (Archæol. l. 18. c. 4.) that when *Pilate* caused some *Roman* Soldiers to march into *Jerusalem* with the *Busts* of *Cæsar* wrought upon their Ensigns, the *Jews* tumultuously exclaim'd against it, as an open Subversion of their Laws, and would not be pacified, till he had removed those Occasions of Offence out of their Sight. Now the Reason of this was plain; the *Romans* paid a Religious Worship to their Ensigns; the chief Standard of their *Legions* bore an *Eagle* at the Top of it, in a little Shrine; and certainly was accounted more Sacred by those Idolaters, when the Pourtraitures of their Emperors were the more conspicuous Ornaments of it. So that if we shall still affirm, that the bare Heads of their Emperors (without any Regard to the Divine Honours paid to them) created that Abhorrence in the *Jews*; we shall find it impossible to give a Reason, why those which were upon the *Roman* Coins, should give them no manner of Disturbance.

bance, Again, the same Historian relates, (*ibid.* l. 17. c. 8.) that *Herod* having erected a golden *Eagle* over the great Gate of the Temple, the *Jews* look'd upon this as an Affront to their Law, and would not be at rest till they had pull'd it down; but this likewise can only serve to shew, that they thought their Temple profaned by such an Image; and does not prove the Unlawfulness of being Owner of the like Sculptures, when only intended as Furniture for private Houses. I shall only now add, that had it been reputed so high a Crime in a *Jew*, to stamp an Image upon his Coin; either *Agrippa* the Great (who is represented to us by *Philo* and *Josephus* as a zealous Observer of the Laws of his Religion) would not have been guilty of it; or *Josephus* (who is forward enough to take notice of any Slips of this Nature in the *Jewish* Princes) would not have fail'd to censure him for it. And now from these Observations I am willing to conclude, that the Conjecture I have propos'd, has some Shew of Probability on its side; but nothing will give it a better Countenance, than a Comparison with that, which asserts the *Romans* themselves to have been *Coiners* of the *Tribute-Money*, whereof we are now speaking. p. 265.

The common Exposition is this; *Cæsar* coins Money now in *Judæa*, therefore he is in Possession of that Country, and consequently is the lawful Governor of it. Here we have the several Propositions in their natural Order, and the full Course of our *Saviour's* Argument. But if this is a right State of the Matter, it will follow, that our *Saviour* us'd a great deal of Art and Contrivance to prove that, which was not in the Question; for he calls for a Sight of the *Tribute-Money*, and demands what was the Image and Superscription, for no other End and Purpose, but only to prove, that *Cæsar* was in Possession of *Judæa*, of which no Man then living in that Country could possibly doubt. But, Secondly, it is confessed, the Question put by the *Pharisees* was concerning the Title of these Governors; whether they had sufficient Authority to challenge Subjection, and might be obeyed as Lawful Sovereigns: But to this it cannot be said (according to *Grotius* and his Followers) that our *Saviour* gave any satisfactory Answer; for to affirm that he inferr'd *Cæsar's* Right from his Possession, is to tell the World, that he maintain'd Consequences which did not follow from their Premises, and introduced a new *Logick* as well as Law. Another Conjecture, much favoured by very eminent Authors, is this; That the Inscription upon the *Tribute-Money* was very probably *Judæa Capta*; and therefore the *Jews*,

by paying their Taxes in such Coin, did in Effect acknowledge they were a Conquer'd People, and consequently bound to comply with such Demands of the *Victors*, as necessary for the Preservation of their Lives, and remaining Liberties; for supposing the *Roman Conquest* never so unjust, it might be lawful however to pay them Tribute; which was the Point the *Pharisees* pretend to be scrupulous in. But this Opinion has the Misfortune to want a Foundation to support it; for, by the Confession of all Learned Men, no such Coin, with *Judas Capt.*, has hitherto been met with, before *Vespasian's* Reign, *Occo*, (*Numism.* p. 52.) it is true, mentions one of *Augustus* with that Inscription upon it, which he believes was coined upon the taking of *Jerusalem* by *Sosius*: But it is observable, he never saw it; for he does not tell us, what the Metal was; which he never fails to do, when he gives an Account of Medals he had seen, or was well inform'd about them. Mr. *Selden* confesses, he could never hear of any such Coin; and none of the Antiquaries since his Time have been able to discover such a Curiosity. Besides, it is not to be imagin'd, that any such Coin should be struck by *Augustus*, or in Compliment to him; for *Jerusalem* was never taken by him, or any of his *Generals*: During the *Triumvirate* indeed, the Eastern Part of the *Roman* Dominions being allotted to *M. Anthony*, he ordered *Sosius*, one of his *Lieutenants*, to lay Siege to *Jerusalem*; who soon made himself Master of it, and placed *Herod* in the Throne; but the Honour of that Action belonged entirely to *M. Anthony* and *Sosius*, not in the least to *Augustus*; who therefore cannot be supposed capable of arrogating to himself the Glory of a Victory, which was by no means his Due.

I return now to the Doctor, who being resolved to dispute every thing asserted by his Adversaries, calls in Question the Authority of the *Cæsars*, particularly of *Tiberius*; and will not allow him a Right to govern, either the *Romans*, or *Jews*. If we grant the *Lex Regia* to be genuine, says our Author (*Wiem.* p. 89.) (which hath been denied in a *Traité de Fictione Legis Regiæ*) yet what is this to *Tiberius's* Title? The *Lex Regia* did not entail the Empire on *Augustus's* Posterity; and if it had, *Tiberius* was none of them.

p. 267. Here we see the Doctor doubts of the Credit of the *Lex Regia*; he is positive that *Tiberius* could derive no Benefit from it. But why does he suspect the *Lex Regia* to be a Forgery? Truly for this admirable Reason, because a certain *Dutch* Writer (*Martin Schoockius*) has been

of this Opinion, in a Treatise upon that Subject. The Doctor should not, methinks, have forgot *Buchanan* upon this Occasion, who, in his Book *de Jure Regni apud Scotos*, first made Objections against the Validity of this Law; but I must beg leave to tell him, that Archbishop *Usher*, Mr. *Selden*, and Mr. *Thorndike* (whose Judgment will always deserve as much Regard, as the Person's he refers to) were of another Persuasion. The Account they give of this Matter, is this; *That in the Beginning of the Roman Empire the Lex Regia was made, by which the People conferred upon the Prince all manner of Power and Authority; and this they assure us, it attested by Ulpian, and Justinian, in his Institutes.* Besides, there is this Day extant in the Capitol, a Fragment of that Law, in which the Powers bestowed upon *Vespasian* by the Senate, are recited; and they are there said to be such, as his Predecessors had enjoyed. Which now of these Two Laws will the Doctor, or his Author, have to be a Fiction? Is it that mention'd by *Ulpian*? Surely that is impossible; it is not to be imagined, that so eminent a Man would endeavour to impose upon the Romans in a Matter they could as easily know as himself. Must we say then, that the Fragment relating to *Vespasian* is a Cheat? But this would not be for the Doctor's Purpose, were it true; and besides, we are well informed of the contrary; for *Monseignor Bianchini* (a Person of no mean Figure in the Commonwealth of Learning) has given it under his Hand, that after an accurate Examination of that Monument, he found all the genuine Marks and Signs of Antiquity upon it; and wonder'd, that any shou'd suspect it to be a Counterfeit. However, the Doctor asks, *What is this to Tiberius's Title?* Now this Question is answer'd by this Fragment of *Vespasian's Lex Regia*; for in it, we find (besides the Power of entering into what Leagues and Treaties he pleased, and many other Privileges) the high Prerogative confirmed to him, that to what Laws soever, either of the Senate or People, it was ordained, that the Emperors *Augustus*, *Tiberius*, and *Claudius* were not tied, from those he should be loose also; which, according to the Mind of the Civilians, is expressed thus; *They are loosed from the Laws (as the Letter of their own Language speaks) that is, they are free from all coercive Obedience to them, and are held by none of the written Ordinances.* From whence it is evident, that *Vespasian* was to enjoy the same Privileges and Prerogatives, that *Augustus* and *Tiberius* did; but they had no Prerogatives, but what were given them by the Senate and People; and because all the several Branches of the

p. 268.

Imperial

Imperial Authority were specified in the Grant, the ancient *Lawyers* gave it the Name of *Lex Regia*. But I shall not contend with the Doctor about this Nicety; for I do not conceive it to be at all material, by what Appellation the Law was distinguished, which conferred the Sovereign Authority upon *Tiberius*, provided the Fact can be proved, that by some such publick Instrument they did really part with their Liberties, and devolve all their Power upon that Emperor. Now I think this may be demonstrated beyond all Contradiction, not only from this Inscription, but also from the *Roman* Historians, who abundantly supply us with Evidence for this Purpose.

Upon the Death of *Augustus*, nothing was ever
 p. 269. more remarkable, than the Contention between the People of *Rome* and *Tiberius*; the first in their Endeavours to impose, the latter to decline the Empire. The Senate fell upon their Knees to him upon that Account; and the ablest of their Orators solicited him in the most important manner, to take the Government upon him; so that at length he was rather subdued, than persuaded; and it seem'd evident, that he accepted of the Imperial Dignity more to gratify others, than to please himself. (Tacit Annal. lib. 1. c. 7. 11, &c.) It was wonderful to see, with what Haste and Precipitation Persons of the highest Rank and Quality labour'd to part with their Liberties: The *Consuls* first began to take the Oath to him; soon after the *Senate*, the *Soldiers*, and the *People*; and all this Forwardness was shewn, before he would vouchsafe to give them Hopes of being their *Emperor*. He was no sooner upon the Throne, but the *Senate* offer'd him all manner of Honours, Titles, and Powers; and in a word, no publick Act was done by him, which could not sufficiently be warranted and justified by his *Tribunitian*, *Consular*, *Proconsular*, and *Pontifical* Authority, or that of some other Offices, with which he was invested by Decrees of the *Senate*. (Dion Cassius, lib. 53. 57. & 58.) So that the Doctor will be hard put to it to prove, that *Augustus* had more Authority conferred upon him by the *Senate*, than they gave to *Tiberius*; Indeed we may venture to say it, that the *Senate* was never more profuse in their Oblations to any Emperor, than they were to *Tiberius*; and therefore if their Consent and Approbation was sufficient to make him a *Rightful* Governor, he certainly had it in as great a Degree, as his Predecessor could pretend to. Is it not then surprizing, what the Doctor tells us, (View, p. 90.) that *Tiberius* wound himself into the Government, and the Submission of the Romans (such as it was)

was) *was his only Title?* As if the *Romans* had ever made an humbler *Submission* to any of their *Emperors*; and the *Submission* of a People that had their Liberties entirely at their own Disposal, were not sufficient to create a good Title. His next Question is, (*View* p. 90.) *Whether the Romans themselves were Rightful Governors of Judæa?* And the Reason of his Doubt is, because there appears no express Act of the Resignation of the Sovereign Power to the *Romans*, like that of the *Lex Regia* to *Augustus*. If nothing less than the very Instrument of Resignation will satisfy the Doctor, we cannot help it; but there are many other Learned and Judicious Men in the World, who will be contented with *Josephus's* Authority in this Matter. I need not trouble the Reader with all the Particulars of this Piece of History; for what Reasons *Pompey* laid Siege to *Jerusalem* and took it; and how the *Jews* came first under Subjection to the *Romans*: It is certain, that *Hircanus*, their Lawful King, was the great Instrument of bringing them under this Yoke; for it was his Party, that surrender'd *Jerusalem* to *Pompey*; and by his Consent the *Romans* were first admitted into a Share of the Government of that Country; and he contented himself with the Title of King, under the *Roman* Protection: Upon this Account learned Men have affirm'd, that the *Jews* made a *Dedition* of themselves at that Time, and were ever after bound, by their own voluntary Act, to pay Obedience to the *Romans*, as their lawful Masters and Governors. By Virtue of this Power and Authority, *Augustus*, constituted *Herod* King of *Judæa*, and afterwards his Son *Archelaus*; but not long after *Archelaus* being deprived of his Kingdom, and sent into Banishment, *Judæa* was then first reduced into the Form of a *Roman Province* by *Augustus*; and the Government of it committed to a *Procurator* under the *President* of *Syria*. This was the State of the *Jews* at the Time of our *Saviour's* Death, and for some Years before; and whatever the Doctor may think of it, there was no Conscientious *Jew* then in Being, but might safely have sworn Allegiance to the *Roman Emperors*. For what Prince, or Family would have been injured by it? Or was there any one living, who could pretend a better Right to the Sovereign Power over them? The Sons of *Herod* were under an absolute Dependency upon the *Cæsars*, and therefore could not presume to lay any Claim to that Monarchy; and the Race of the *Asamonæi*, the old Hereditary Kings of the *Jews*, was entirely extinct: The *Romans* therefore could not possibly be *Usurpers*, when no Title could be set up against them; and

and for that very Reason were lawful *Possessors*; because no Proprietor was in Being, who could charge them with doing him Injustice. In this Case, *Self-Preservation*, and the *Publick Good* (Principles to often abused upon other Occasions) did oblige the *Jews* to submit to the *Romans*, and acknowledge their Authority, even though they had never before yielded themselves up to their Government; for though, upon the utter Extinction of a *Royal Family*, Subjects are at Liberty to choose the next Successor who shall reign over them; yet if any Person, in such a Juncture, shall get Possession of the *vacant Throne*, even by Force and Violence; it is then so much for their Interest, that it becomes their Duty, to comply with the Necessity of Affairs, and suffer him to be their King, whom they cannot attempt to depose, without the apparent Ruin of their Lives and Fortunes. Thus the Doctor sees, his Adversaries are willing to allow that Possession gives a Right in certain Cases; viz. when the Subjects preserve themselves by yielding Obedience to the King *de Facto*, without violating the Rights of a Third Person: But this Concession will do him no Good

p. 272. in his main Question, and hurts him in that which concerns the Authority of the *Roman Emperor*, over the *Jews*; for in this latter Case, as I have now stated it, was plainly lawful for them at least, to become their Subjects; and every thing rightly consider'd, their Duty too. It should be observ'd, that had the *Romans* withdrawn their *Legions* and Protection, at *Herod's* Death, and abandon'd the *Jews* to their own Conduct and Disposal; the Sons of *Herod* would soon have torn their Country in Pieces; and whoever had prevail'd, had ruled them with the utmost Degree of Tyranny. On the other hand, they had long Experience of the Humanity and Goodness of the *Romans* to them; by many extraordinary Decrees made in their Favour; (Vide *Decreta Romana*, &c. pro *Judeis*, nuper à Gronovio edita.) and *Philo* (In Legat. ad Caium.) *Judeus* has given us a large Account of the particular Kindnesses shew'd to them by *Augustus* and *Tiberius*; so that had they been left to their free Choice, they could not have made a wiser, than to live under the Government of those *Emperors*. The Doctor indeed fancies, it will be some Refuge to him to say, (View p. 50) that the *Jews* were forced to this Submission to a superior Power; but I have shewn, it was their Interest; and certainly that Violence is very agreeable and obliging, which compels Men to do Things, that are highly for their Advantage; that is, as becomes Rational Creatures. But should we allow it to be true, that this Submission of the *Jews* was forced and

and extorted; it cannot possibly do the Doctor any Service. For will he say, that Promises and Oaths obtain'd by Violence, from a People that had Power to make them, are of no Obligation? What then will become of Leagues and Treaties between Princes, after a long and bloody War, when disadvantageous Conditions of Peace are imposed upon the unsuccessful Party, and they must either accept of them, or resolve to prosecute the War to their evident Ruin? Will the Doctor maintain, that these Treaties are Void and of no Effect, and that the Princes, who were forced to comply with these Terms, may lawfully have Recourse to Arms again, whenever they see an Opportunity? The Doctor knows, that *Grotius*, and *Sanderson*, and all the ablest Casuists are of another Opinion; and he will find it difficult to answer their Arguments. I shall only beg Leave to put him in mind, upon this Occasion, of the Judgment of two great Historians, relating to p. 273. this Question. *Francis I. King of France*, having been taken Prisoner by the Emperor *Charles V.* was some time after set at Liberty upon his *Parole* of Honour, by which he obliged himself to return again to the Emperor, if the Conditions were not perform'd, upon which he was released. But *Francis* being once at Liberty, pretended he was not bound by the Promises he had made in Captivity, affirming, *that no Man under Ward could plight his Faith*: Upon which my Lord *Herbert* makes this Reflection: *Nevertheless, I must not omit to say, that the Excuse of Francis was not generally approv'd of, nor his Cartel thought just; for if a Prisoner of War may avoid his Promise, because he made it under a Constraint, it would follow, that few or none would be taken Prisoners, but kill'd upon the Place; which would make the War not only more bloody and barbarous, but even destroy a principal Part of that Jus Gentium, which in these Cases has been inviolably observ'd in all Times.* (*Life of Henry VIII.* ad ann. 1528.)

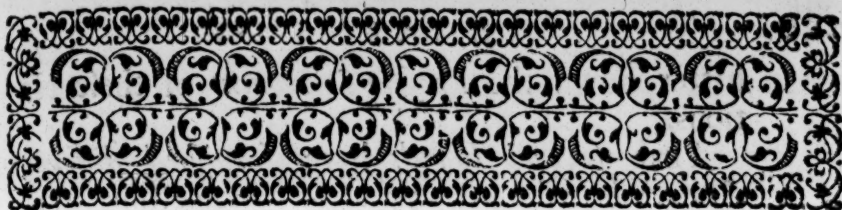
The other Historian is the present Bishop of *Salisbury*, who tells us, (in his *Hist. of the Ref.* Part 1. B. 3. p. 289.) That King *Henry VIII.* having prevail'd with the Convocation to annull his Marriage with the Lady *Anne of Cleves*, one of the Reasons which influenced that Assembly was this, *That the King having married her against his Will, he had not given a pure, inward, and complete Consent: And since a Man's Act is only what is inward, extorted or forced Promises do not bind.* But the Bishop's Censure upon these Proceedings is remarkable. *This was* (says his Lordship) *the greatest Piece of Compliance, that ever the King had from the Clergy; for as they*

they all knew, there was nothing of Weight in the *Præcontract*; so they laid down a most pernicious Precedent for invalidating all Publick Treaties and Agreements: Since if one of the Parties being unwilling to it, so that his Consent were not inward, he was not bound by it; there was no Safety among Men more. For no Man can know, whether another consents inwardly: And when a Man does any thing with a great Aversion, to infer from thence, that he does not inwardly consent, may furnish every one with an Excuse, to break loose from all Engagements; for he may pretend he did it unwillingly. Lastly, The Doctor has acknowledged, that Zedekiah and the Jews submitted to the

King of Babylon, and took an Oath to him, before GOD had commanded them to do so: But surely they did not make this Submission willingly; it was the Effect of Force and Violence, which they must either have complied with, or exposed themselves to utter Ruin: May we say therefore with the Doctor, that their Oaths and Engagements signified nothing, and could not bind them against the Interest of their Country? But the Prophet (Ezek. xvii. 15, &c.) has taught us another Doctrine, he tells us GOD was highly incensed by the Violation of the Oath and Covenant made to the King of Babylon, and threatens them with the Severity of His Vengeance upon that Account. The Prophet's Words are remarkable, and therefore I shall conclude with them. *Shall he prosper? Shall he escape that doth such things? Or, shall he break the Covenant and be deliver'd? As I live, saith the LORD GOD, surely in the Place where the King dwelleth, that made him King, whose Oath he despised, and whose Covenant he brake, even with him, in the midst of Babylon shall he die. Seeing he despised the Oath, by breaking the Covenant (when lo! he had given His Hand) and hath done all these things, he shall not escape.*

Thus far the Authors of the HEREDITARY RIGHT, &c. Who cannot charge us with having omitted or suppressed any material Part of the *Facts, Positions, and Arguments*, which we propose to refute and overthrow in the following Observations.

REMARKS



REMARKS

AND

OBSERVATIONS.



BEFORE we enter upon a *Particular Examination* of the Book, it will not be amiss to bestow a few *general Observations* on the *Authors*, and *Design* of this *elaborate Performance*. If we can rely on the *Credit* of the *Title Page*, we must believe it to be *written by a Gentleman*; And indeed, the *Style*, and *genteel Air* that shines through the whole Piece shews it to be the *Work* of a *Man of Parts*, and *Liberal Education*. But then if we consider the *Person* who seems to father it by his *owning* the *Handing* it to the *Press*, together with the *Multitude* of *Quotations*, that argue a deeper *Knowledge* in *History*, the *Law*, and *Divinity*, than any *Single Man* can probably be *Master* of, We shall not scruple to believe *common Fame* and *private Informations*, both which agree, that 'tis the *Product* of the *Joint-Labours* of the most eminent *Nonjurors* and *Jacobite Writers*, who have all contributed to the *Rearing* up this *Mighty* (and as their *Party* give out) *Impregnable Fortress*, in order to oppose, and
batter

batter down the *Present Settlement* of these Nations.

That *several Hands* have furnished different *Materials*, will yet appear to be something more than a bare Conjecture, if we nicely view the *Contexture*: For tho' the Stone be well cut, the Wood well plained, the Ornaments well carv'd; yet there is a Defect in the *Cement*, which renders several *Cracks* and *Crevices* obvious to the Eye: And, indeed, the whole Fabric consists of so many *Heterogeneous* and *jar-ring Parts*, that 'twas difficult, if not impossible for the best Artist to tack them well together. To leave the Methaphor; this Book contains a great Variety of Historical Facts, Positions, and Arguments, couch'd in an elegant, flowing Style: But then there are in it so many *glaring Contradictions* and *Inconsistencies*, that 'tis hardly credible, the whole Piece should be the Work of any one Man. For here any tolerably Attentive Reader may find *History clashing with History*; *Law destroying Law*; and *Divinity refusing Divinity*, in Cases *exactly* Parallel: A Fault I will not charge upon any single Person, till I am convinced that a too favourable Opinion of Gentlemen and Men of Letters, led me into a Mistake.

A manifest Contradiction will instantly appear upon Comparing the *Title* and seeming *Design* with the *Contents* of the Book. The *Design* if we believe the *Title Page* is to assert the *Hereditary Right of the Crown of England*, to clear the *History of the Succession*, since the Conquest, and to vindicate the true English Constitution: But if we examine the *Contents*, we will find, That the Authors (I beg leave to mention them in the Plural Number) *set up Hereditary Right* in one Place, and *pull it down* in another. That according to them, sometimes a *Resignation* (tho' it be but a *tacit* one) and, that at other Times, a *Will and Testament* makes a legal Settlement of the Crown. The Truth is, their real

Design

Design is to open a Gate for the *Pretender* to enter at: Whether it be by an *HEREDITARY*, a *CESSIONARY*, or *TESTAMENTARY Right*, is none of their Concern. To make Room for his Entrance, is the only Object and Subject-Matter of their Labour; in order to which they boldly run down and trample under Foot all *Parliamentary Right*; Charge the whole Nation with *Treason* and *Rebellion*; arraign our late ever glorious DELIVERER King *WILLIAM*, of *Usurpation*; and would involve our Present most Excellent and Rightful SOVEREIGN in the same Traiterous Accusation, but that, with the Help of *Jesuitical Morals*, they think it Prudence to absolve Her, tho' upon no other Terms, than the Supposal of an Intention to *secure the Crown to the Right Owner*. Thus much for the Authors, and the general Design of the Book; let's now particularly animadvert upon their Performance. And if in following them Step by Step through their Historical Windings and Turnings, Mazes of the Laws, and Scriptural *Meanders*, we can evince the Weakness of their Foundation, we may reasonably hope that their whole Superstructure will tumble to the Ground, and like enchanted Castles, that owe their Being to the Spirit of *Delusion*, vanish at the Appearance of Truth.

The first setting out * of the Authors, is some-
 what Ominous, and forebodes many a Fall, be-
 fore they arrive at their Journey's End: For it
 seems, (if I may be pardon'd a coarse Expression) * Pag. 1
 1. False
 Assertion of
 the Au-
 thors.
they stumble at the very Threshold. They pre-
 tend, *That the first Time that the Duty of Pay-
 ing Allegiance to Powers in Possession began to be
 taught publickly in this Kingdom, was during the
 Usurpation, which succeeded the Death of King
 Charles I.* But the Authors themselves acquaint us,
 that this Distinction between Kings *de Jure*, and
 Kings *de Facto*, or which is the same of Kings
 in Deed, and not of Right, was known several
 Ages before, as appears from their own Words
 and

and Quotations, p. 220, 229 230, 232, 248, 249, 250. and several other Places; to which I may add, My Lord Bacon's History of Henry VII. p. 1. & Seqq.

The Authors are not more happy in their next Assertion, (b) That the Revolution (in 1688.) was begun, carried on, ended, and justified on these Grounds, *That Allegiance was not due to all Kings in Possession; That King James was lawfully deprived. That King William and Queen Mary were lawfully put into Possession, &c.* For the main Argument and Foundation upon which the Lords did, on the 6th of February 1688-9, come to this Resolution, *That the Prince and Princess of Orange shall be declared King and Queen of England, and of all the Dominions thereunto belonging, was the VACANCY of the Throne.* Mr. Paul Foley, (a Gentleman who I am glad to have an Opportunity to mention on so good an Occasion) in the famous Conference that was held that Day between Both Houses of Parliament, did not stick

(c) See to say: He hoped (c) there was no Danger of Shaking our Fundamentals in this Case, that they were pursuing those Methods which agreed with our Laws and Constitution; for tho' the Monarchy of this Nation be Hereditary in the Ordinary Course of Succession, yet there may fall out a Case wherein that could not be complied with, and a plain Vacancy might ensue. For, added he, put the Case the whole Royal Line should fail, should we in that Case have no Government at all? And who then shall we have but the Lords and Commons? And I think that comes nearest to the Case in Question where the Successor is not known; for if he had been, we should have heard of him before now. And what is the Reason that it should then in the former Case devolve to the Lords and Commons, but that there is no King? And they being the Representative Body of the Kingdom, are the only remaining apparent Parts of the Government, and are only to supply the Defect by providing a Successor. 'Tis true another Commoner (Mr. G---

E....e)

E---e) subjoined, *That they had declared, that the late King James had broke the Original Contract, violated the Fundamental Laws, withdrawn himself out of the Kingdom, and Abdicated the Government*: But that very Gentleman urged, *That therefore there was a Necessity to make some Conclusion, and none so natural as this, that the Nation was left without a King, that the Throne was thereby Vacant*. The Managers of the Lords being return'd to their House, the Earl of *Danby* (late Duke of *Leeds*) made also a fine Speech to prove the VACANCY of the Throne, and the Necessity of Supplying the same by the Prince and Princess of *Orange*; wherein he was seconded by the late Marquis of *Hallifax*; whereupon the Vote beforemention'd was carried by 65 Votes against 45. The same Reasons which induced the Lords and Commons to declare the THRONE VACANT were afterwards set down at large in the *Declaration*, which on the 13th of *February* was presented by Both Houses to the Prince and Princess of *Orange*, and was afterwards digested into an Act (1 W. and M.) Nor does it any where appear that either the Convention, or any Subsequent Parliament justified the *Revolution on this Ground, That Allegiance is not due to all Kings in Possession*: Which is the SECOND ERROR, or false Assertion, I shall take Liberty to charge on the Authors.

Before I proceed, I must advertise my Readers, That I do not take upon me to expose and confute the small *Cavils* of the Authors against Dr. *Higden*; not doubting but that Learned Divine will detect and defeat the *Sophistry* of his Adversaries and vindicate himself much better than I can pretend to do. I shall therefore little concern my self in the *strain'd Consequences* the Authors draw * from his Assertions about the Usurper *Cromwell*: Yet I cannot but observe, that they entertain a very mean Opinion either of his Learning or Judgment, in supposing He can maintain that the Three Estates have a Power to

* p. 4.
6.

depose Lawful Kings: But if the Doctor should affirm, That the Three Estates have a Lawful Power to *set aside, depose, or abdicate* a Tyrant, a *Mad-man*, or an *Idiot*, and place a Prince of the Royal Line, tho' *not next in Blood*, in the Throne, he should not want Precedents, either at Home or Abroad to bear him out. Instances of this Kind are so frequent and so notorious, that I shall not detain my Readers by reciting them here.

(d) p. 9. Neither shall I take Notice of what the Authors (d) object against Dr. Higden's Assertion, that *our Lord does determine the Lawfulness of Subjection to the Roman Emperor, for this one Reason*; ----- namely, that he was in Possession of the Government: Because that Objection will come under Consideration in a properer Place.

() p. 10. I hasten to the main Question, whether (e) the Kingdom of England be HEREDITARY? Or whether it belongs, of Right, to every one, who gets Possession? Whether the Kingdom appertains to Lawful Heirs, or Actual Possessors? --- Dr. Higden in his *View and Defence* acknowledges that the Crown is Hereditary, but then he asserts that the Inheritance may be limited by Parliament; that a King placed on the Throne by the States of the Realm, is a True and Lawful King for the Time being; That either Queen Mary or Queen Elizabeth, one or both were Illegitimate, and yet had a Lawful Title; And that it is our Saviour's Doctrine, that Subjection is due to Possession, and by the Law of Nature to Protection. Now the Authors, whose Business it is to overthrow a System, which accounts for and vindicates the late happy Revolution, and to shew that not so much as Submission to it, after it was made, was Lawful, pretend (f) That the English Monarchy, (like those of France, Spain, Portugal, Sweden, Denmark, Hungary, and all other Hereditary Dominions in the World) is 'entail'd in one Family, and descends successively to the Lineal Heirs. Such, add they, is the English Monarchy, govern'd successively above Nine Hundred Years by

(f) p. 11. the

the same Royal Family. — Here's a plain, positive, and express Definition of the English Monarchy, by which a Chinese, a Tartar, or any other Foreigner, absolutely ignorant of our History, would be apt to imagine, That for the Space of 900 Years the Crown of England has continued in one Family, and descended in a direct Line to the next Heir in Blood: Than which nothing was ever more Notoriously False. Nor do I want any Authorities to prove it; since the Authors themselves own, That there have (g) been many Interruptions in this Lineal Succession: (g) p. 12. Some by the Cession of the next Heir; others by Testaments; others by Conquest; and others by false Pretence of Inheritance: But as Right has been always pretended, so all notorious Violations of Right were condemn'd, at the Time by all Good Men, and rejected after by the whole Nation; which has always restor'd the Rightful Heirs, &c. Now, I'd fain ask any Reasonable Man, what's become of the Authors Definition of our Hereditary Monarchy? Where's their Lineal Succession of the Rightful Heirs for Nine Hundred Years? The Species of Things, according to the Authors is determin'd by their constant Nature; now if I can demonstrate that in all the various Changes that have happen'd in the Succession of England, all Titles whatsoever were look'd upon as precarious, till they were confirm'd by Parliament, I hope I may confidently affirm, that the CONSTITUTION of England, is an Hereditary Monarchy LIMITED by PARLIAMENT.

3d False
Position of
the Authors

True Defi-
nition of
the English
Constitution

To make good this Definition, of our excellent Constitution, and, at the same Time, vindicate the late Revolution, and the Protestant Succession in the most Illustrious and most Serene House of Hanover, I shall desire my Readers to observe, That whether the People of England had ever practis'd it or no, yet it has been, now, is, and always will be their Right to dispose of themselves in the Manner they shall think most conducing to the securing their Liberty and their

Wealth, and to procure their Happiness in any other Respect: But they have likewise acted upon this Principle, ever since they were known to be a Nation; And if, at any time they found themselves deceiv'd in the Person, or mistaken in the Form, they seldom fail'd immediately to apply the proper Remedies, either to rectify past Errors, or prevent future Inconveniences.

(h) p. 12. This is the true Occasion, of the many (h) Changes that have been in the Succession of England; To this are owing *Magna Charta*, and the other *Legal Fences* of the Liberties and Properties of the Subject. And hence the Ignorance or Calumny of those may be confuted, who account us the most *changeable* Nation in *Europe*; For tho' there have been divers *Temporary Constitutions*, if so they may be call'd; yet never was there a Nation more constant either in their *Love of LIBERTY*, or in the *Pursuit of the Means* to attain, and preserve it. Moreover, our Manner of Constituting the Chief Magistrate, is the laudable Medium between Two most vicious Extreams, viz. *Election* and *Lineal Succession*: For to elect the Sovereign anew upon every King's Death or Demise, would expose us to all the Uncertainty, Broyls, Confusions, Bribery, and other Mischiefs so frequent in Elective Kingdoms; and, on the other Hand, to make the *Succession absolutely Hereditary*, would subject us, without Remedy, to be govern'd by Tyrants, Madmen, Fools, or Idiots. Therefore, in all Ages, our constant Custom and Practise has been, to limit the *Succession under Conditions* to a certain Line, for Avoiding all the Contests and Disturbances at frequent Elections; and yet to reserve a Power of excluding the next in Blood, if under any Incapacity of Reigning, or, tho' capable, yet sometimes not so fit as a Worthier in the same Family; and, very often, for great and important Reasons, quite to transfer the Right of Succession from one Line to another. This is so evident by our Laws, and so express in our Histories, That no English

Man

Man can be suppos'd to be ignorant of it: And therefore 'tis the highest Piece of Immodesty, for the *Authors* to advance, That the *Englith Monarchy is Hereditary, and has descended to the Lineal Heirs of it for the Space of above Nine Hundred Years.* The *Authors* urge, That, (i) those (i) p. 12. *Temporary Constitutions fell upon a Rock; and none of them lived so long as to gain the Title of Prescription: Whereas the Tree of Hereditary Right has been several Times cut down to the Ground; but the Stump of the Roots in the Earth has grown up again, and has reach'd unto Heaven.* But if by tracing up the Succession as high as the *Authors* do, viz. to *Edward the Confessor*, I can evince, That those Kings from whom the *Authors* deduce their *absolute Hereditary Right*, had themselves either no Right at all, or only a *Parliamentary Title*, I hope we shall (k) hear no (k) p. 13. no more either of their *Chimerical Prescription of Nine Centuries, or their Visionary continual Claim of 550 Years; And that, on the contrary it will appear, That the Parliamentary Right is the only Right, that can claim Prescription.*

Account of
the Succession from
Edward
the Confessor to K

So little was either the *Lineal Hereditary Succession*, or the last *Wills and Testaments* of the preceding Kings valued in the *Saxon Time*, That we hear almost of every King's *Election* before his *Coronation.* EDWARD, for his Piety Sir-named the CONFESSOR, the last of the *Saxon Race*, did not succeed *Hardicanute the Dane* and *Queen Mary* by *Birth-Right*, for the true Heir, viz. *Edward* his Nephew, Son to his Elder Brother *Edmund Ironside*, and Father to *EDGAR ATHELING* was laid aside. 'Twas so notorious, That *Edward the Confessor* had no *Natural Right*, that *Arfred Abbot of Rival*, endeavour'd to give him a *Supernatural and Divine Title*, by a *Monkish Dream* which declared, he was elected, when in his Mother's Womb: But if it had been true, that *Election* was Vacated by the Interposition of *Edmond Ironside*, and the Succession of Three *Danish Kings.* The Truth is. *Edward*, Son to

King *Ethelred* by Queen *Emma*, was as *Ingulphus*, a contemporary Writer, informs us, (a) CHOSEN KING BY ALL; chiefly through the Interest of the Earl *Godwin*, whose Daughter the *Confessor* afterwards married; and in Hopes and Consideration of which Match, that treacherous Earl stickled so much for *Edward's* ELECTION. I call that Earl treacherous, because he was the Unhappy Instrument of *Alfred*, that King's Brother losing his Eyes according to *Henry* of *Huntingdon*, and even his Life according to others (b). That *Edward* the *Confessor* was not advanc'd to the Throne by *Hereditary Right*, appears not only from the Historians already quoted, but also, from *William* Monk of *Malemsbury*; For tho' when he speaks of his Accession to the Crown, he only tells us, That, *Regnum* (c) *Suscepit*, that is, he undertook the Kingdom: Yet the same Author afterwards (d) gives us to understand, That "when this King saw Old Age coming on apace, considering that he had no Issue, and that Earl *Godwin's* Sons grew into Power and Credit, he sent to the King of *Hungary*, to desire him, that he would send him his Brother *Edmund's* Son called *Edward*, with all his Family." For this *Edward* had been kindly entertain'd by that King, after his Expulsion by *Canute*, and, (according to *John* *Bromton's* Chronicle) that *Hungarian* King had bestow'd his Niece *Agatha*, Daughter to his Brother *Henry*, Emperor of *Germany*, on the said *Edward* call'd the *Outlaw*, as being the true Heir of the *English* Crown. Pursuant to *Edward* the *Confessor's* Invitation, his Nephew *Edward* the *Outlaw* return'd with his Family, and the *Confessor* declared, That either he (*Edward* the *Outlaw*) or his Sons should Succeed to the *Hereditary* Kingdom of *England*, (these are the express Words of *William* of *Malemsbury*) and be a comfortable Supply for his want of Issue.

(e) *Ingulphus*, (who was some Time Secretary to *William* the *Conqueror*) tells us, (e) "That *Edward* the

(a) *Post ejus obitum omnium ELECTI- ONE in Edwardu concorda- tur, maxi- me cbor- tinte God- wino Comi- te. Ingul- phi Hist. p. 62.*

(b) *Flor. Wigor. Chron. p. 623.*

(c) *W. Malmesh. de Gest. Reg. Aug. l. 2. c. 13. p. 79.*

(d) *Id. ibid. p. 93.*

(e) *Ingul- phi. Hist. p. 68.*

the Confessor, (who much cherish'd the Normans, in whose Country he had been brought up) seeing Edgar the Son of Edward the Outlaw lately deceased, not fit for Government, either as to Body or Courage; and withal, that the numerous wicked Family of Earl Godwin daily encreased, he turn'd his Thoughts towards his Kinsman William Duke of Normandy, and solemnly decreed, that he should succeed him in the Kingdom of England." Here was an EXCLUSION of the Right Heir with a Witness! A King, who had no Title to the Crown by Lineal Descent, to give it away after his Death, from one who had the best Title, and to one who was Illegitimate, and consequently (according to the Assertors of Hereditary Right, p. 11.) of Blood to none in Law, Nullius Filius, and who therefore could not Inherit: And yet this is the Foundation, on which the Authors I have undertaken to confute, build their imaginary System of ABSOLUTE HEREDITARY RIGHT!

Let us set this important Matter in a clearer Light: 'Edward the Confessor, (says Sir William Temple (f) had by the Persecution of his Enemies, under the Reign of Harde-Canute the Dane, been forc'd to leave England, and seek Shelter in Normandy, where he was kindly receiv'd, nobly entertain'd by the Duke; lived long there with many English, who adhered to his Right, follow'd his Fortune, and shared in the Causes and Reliefs of his Banishment; some found Employments, others Alliances: All, favour and kind Reception in Normandy. These mutual good Offices, produced so much Kindness between the Givers and Receivers; that 'tis by some Writers reported, King Edward during his Residence in the Norman Court, promised Duke Robert, that in Case he recover'd the Kingdom of England, and died without Issue, He would leave him the Crown. The first happening, and Edward restored by

(f) *Introd. to the Hist. of Eng. p. 100.*

' the Power of Earl *Godwin*, or rather the ge-
 ' neral Discontents of the *English* against the
 ' *Danish* Race and Government ; 'tis certain King
 ' *Edward*, after his Restoration, or rather first
 ' Accession to the Crown, ever appear'd more
 ' favourable and partial to the *Normans*, than
 ' was well resented by his *English* Subjects in
 ' general ; but Earl *Godwin* and his Son *Harold*
 ' were so offended, that they made it the Cause
 ' or Pretence of a dangerous Insurrection, and
 ' were forced, upon the ill Success thereof, to
 ' leave the Kingdom, and fly into *Flanders*, tho'
 ' after restored and receiv'd by the King, ra-
 ' ther by Force, than any free and willing Con-
 ' sent. Duke *William* (the *Conqueror*) after the
 ' End of his Wars with *France*, made a Journey
 ' into *England*, where he was receiv'd and enter-
 ' tain'd by K. *Edward*, with the same Kindness
 ' himself had found in the *Norman* Court. In
 ' this Visit, 'tis said by some Authors, that the
 ' Duke gain'd so far upon the Esteem and Kind-
 ' ness of the King, that he then renew'd to the
 ' Son in *England*, the Promise he had formerly
 ' made the Father in *Normandy*, of leaving him
 ' the Crown by Testament, in Case he died
 ' without Issue. Some Time after the Duke's
 ' Return, *Harold* Son to Earl *Godwin*, and Heir
 ' of his great Possessions and Dependances in *En-*
 ' *gland*, was forced by a Storm (as he at least pre-
 ' tended) upon the Coasts of *Normandy* ; and
 ' to refresh himself went first to the *Norman*
 ' Court, and after some stay there, to that of
 ' *France* ; and was in both entertain'd like a
 ' Person known to be of so great Consideration
 ' and Power in *England*. But the last Visit at
 ' *Paris* was thought design'd only to cover the
 ' true Intention of his first in *Normandy* ; where
 ' he engaged to assist the Duke in his Claim to
 ' the Crown of *England* upon King *Edward*'s
 ' Death ; which happening not long after, *Wil-*
 ' *liam* claim'd the Crown by Virtue of a Testa-
 ' ment from the King, and of an Engagement
 ' from

' from *Harold*: But the latter, on the contrary,
 ' denied any such *Testament* from the deceased
 ' Prince; alledged an Appointment made by him,
 ' at his Death, for *Harold* to Succeed him; dis-
 ' own'd any Promise made in favour of the Duke;
 ' and making the best Use of the Credit and
 ' Authority gain'd by his Father, and himself, in
 ' a crasy and diseased State, during the Soft
 ' Reign of a weak tho' pious King; *Harold* set
 ' up boldly for himself, without any Respect of
 ' Right, beyond the People's Submission, inter-
 ' preted by their Consent, and was elected King,
 ' by those Nobles and Commons of his Friends,
 ' or indifferent Persons, who assembled at his Co-
 ' ronation, leaving *EDGAR ATHELING* an
 ' UNDOUBTED, but yet UNREGARDED
 ' RIGHT of SUCCESSION; and to *William*
 ' a disputed Plea, from the alledged *Testament*
 ' of the deceased King.

The Authors of the *Hereditary Right* &c. take
 upon them to clear *K. Edward the Confessor* from
 the Charge of Usurpation, on his supposed *Inten-*
tion of Securing the Crown to the *Right Heir*,
Edward the Outlaw, or his Son *Edgar*, whom he
 sent for from *Hungary* for that Purpose: But
 how will they reconcile such an Intention, either
 with his *Testament* by which Duke *William*,
 claim'd the Crown, or with his *Death-Bed De-*
claration, by which *Harold* assumed it? Let them,
 with all their Art and Eloquence, resolve this
Dilemma, if they can: For my Part, I shall at
 present content my self to lay down this unde-
 niable Position, That *EDGAR* the RIGHT
 HEIR of the Crown was EXCLUDED from it,
 and *Harold*, who had not the least Shadow of a
 Title, thrust himself into the Throne, and was so-
 lemnly crown'd by *Aldred*, Archbishop of *York*.

'Tis true, *Ingulphus*, *William of Malesbury*,
Florentius Bromton Abbot of *Joreval*, and other
 Historians, differ in their Accounts of *Harold's*
 Accession to the Crown; and *Bromton*, in parti-
 cular, tells us that upon the Death of the *Con-*
 fessor

feffor some of the *English* Nobility attempted to make *Edgar* King: But all do agree in this, that by *Harold's* Advancement to the Throne, the *Hereditary Succession* was wholly laid aside by the *Major Part of the Nation*, who, according to (k) *Wil. of William of (k) Malemsbury*, debated only whether they should submit to him, or to *Duke William*. On the other Hand, we must observe, l. 3. p. 99. that this *Harold* was the only Person, who from King *Egbert's* Time was Possessor of the *English* Throne, without being descended of the Royal Blood of *Cerdic*, excepting the Three *Danish* Princes: For in all other *Deviations* from the *Direct Line*, still the *Royal Family* was had in *Consideration*, so that one or other was *SELECTED* to sit upon the Throne of his Ancestors; which was likewise observed in all *Subsequent Deviations*. Nor does this Case of *Harold* favour *Usurpations* of Strangers to the Blood Royal; for according to the *Historians* beforemention'd, *Harold* was advanc'd to the Throne rather by *Force*, than by *Election*; and consequently cannot, in a strict Sense, be produced as an Example of the Latter. All that I contend for here, is that *Edgar*, the *undoubted Rightful Heir*, was laid aside, a *Second Time*.

Duke *William*, fond of those ambitious Hopes he had framed early, and nourish'd * long, and spighted at the perfidious Dealing of *Harold* towards him, and his Insolence towards the *English* Nation, in seizing the Crown and Government against all Justice, or so much as Pretence of Right, resolv'd to prosecute his Claim with his utmost Power; and being assisted with Men and Money both by his own Subjects, and by many foreign Princes, made mighty Preparations for his intended Expedition, and landed at *Hastings* in *Sussex*, about the Beginning of *October* 1066. There he continued in a quiet Manner for about a Fortnight; either to refresh his Troops or to expect how his Claim to the Crown, and Arrival upon it would be receiv'd in

* Sir W. Temple. ubi supra. p. 106. & seqq.

in *England*. But he was soon roused by the Approach of *Harold*, who return'd from the Defeat of his Brother and his *Danish* Assistants, with all the standing Troops he brought off from his dear-bought and bloody Victory at *Stamford*, and all he could invite or collect out of the Country as he pass'd. And here we may Observe, That tho' *Harold* was a known Usurper, cruel in his Nature, of *Danish* Extraction, and thereby ungrateful to the *English*; a Hater of his own Blood, and who had never triumph'd but over his own Brother; yet, notwithstanding all these Disadvantages, he was able to assemble a mighty Army, to oppose Duke *William's* Invasion, and find above 60000 Men, brave enough to lose their Lives in his Defence; for so many are agreed to have been slain of the *English* at the Battle of *Hastings*, where he lost his Crown and his Life together: Than which nothing more shews both the Greatness of *England* at this Time, and the Reverence the Nation ever paid to the Possessor of the Crown.

Harold's Overthrow and Death made a sad and strange Change in the Scene of *English* Affairs; For tho' after that great Slaughter some (n) chose (n) *Wil.* *Edgar* for their King, and seem'd willing to advance him to the Throne, yet that Design soon Malmesb. ubi supra, P. 93. fell to the Ground: In the mean Time, *William* Duke of *Normandy*, justly from his Victory and ensuing Fortunes stiled the Conqueror, went burning and destroying all before him; till *Alfred* Archbishop of *York*, *Walstan* Bishop of *Worcester*, *Edgar Atheling*, the Chief of the Nobility. and of the *Londoners*, with several others, submitted themselves and swore Allegiance to him. By this Revolution the Royal Blood of the *Saxons* was not only rejected and excluded for ever, but the Succession fix'd upon another Basis: For, according to *Oldenburgher*, (in the Second Part of his *Thesaurut rerum publicarum*) tho' *William* the First seem'd to enjoy the Kingdom by the Title of Conquest, yet he founded his

Right

Right upon the *Election* of the People; being after his Victory created and elected by the Consent of the Clergy, Nobility, and Commons. As for his Leaving the Kingdom to his Son *William Rufus* by WILL, the same Author makes no mention of it, but rather asserts the Contrary, Quoting, out of an old Book, call'd *Liber Cadomensis*, or the Book of *Caen* in *Normandy*, thele very Words of the Conqueror's Will and Testament, viz. *Neminem Regni Angliæ constituo Heredem; non enim tantum Decus Hereditario Jure possedi: That is, I appoint no Heir to the Kingdom of England; for I did not enjoy so great a Dignity by Hereditary Right.*

Thus I have proved by the most authentick and most irrefragable Testimonies, That the Two Princes from whom the Authors of the Book, which is the Subject of these Remarks, derive the Notion of *Absolute Hereditary Right*, (viz. *Edward the Confessor* and *William the Conqueror*) had no such Right themselves; and consequently that They neither could nor did transmit such a Title to his Posterity. And having thus overthrown and batter'd to Pieces the *Falle Hypothesis* of our Adversaries, let us take a Cursory View of the Succession from *William the Conqueror* to this Time, by which it will evidently appear. First, That the Crown is not a *Lineal Inheritance*; Secondly, That it cannot be alienated, made over, or bequeathed, by any Single Deed, Resignation, or Will and Testament of the Prince, without an exprefs Consent and Sanction of the States, or Parliament: And, consequently, That according to our Definition, the Crown of England, is an *Inheritance limited by Parliament*. The Facts I shall alledge are so notorious, that a Man that should offer to call any of them into Question would betray a profound Ignorance of our History; and therefore I shall spare the Readers, and my self, the Trouble of Quotations; and reterr them for Vouchers to a Book publish'd some Time after the Revolution,

on, and reprinted in the *State-Tracts*, Vol. I. pag. 341.

Whether *William* the first of the *Norman Race* made a *Will* or no, is not very material: For his second Son *WILLIAM RUFUS* had so little Regard to it, that he rather chose to have his Title confirm'd by the People; which after a long Consultation was done by a general Assembly of their Representatives convened at *Westminster*, and so his Eldest Brother *Robert* was excluded from the Succession. Nor were the People wanting in maintaining the Right they gave him against all the Attempts of the *Normans*, or any other Abettors of Duke *Robert*, who was a second time rejected by reason of his Aversion to the *English Nation*, and the Cruelty of his Disposition: Whereas on the third Son *HENRY's* promising to restore the ancient Liberties of the Nation, and to abrogate some severe Laws which the Father had made, the People consented to make him King. He dying, his Daughter *MAUD* the Empress was laid aside, and *Stephen* Earl of *Bologne*, Son to *Adela* the Conqueror's Daughter, was by the Consent of the Clergy and People of England Elect-ed King, tho' his eldest Brother *Theobald* Earl of *Blois*, was then alive. He afterwards adopted *Henry* the second for his Heir, tho' *William* a Son of his own was then living, and *HENRY* was accordingly declar'd the Successor in Parliament, notwithstanding the previous Right of his Mother. To him succeeded *RICHARD* the first, confirm'd in the Succession during his Father's Life, and on his Death solemnly elected by the States of the Realm. Having dy'd without Issue, *ARTHUR* the Son of his next Brother ought to have succeeded hereditarily; but *JOHN* his younger Brother was prefer'd before him, at whose Coronation *HUBERT* the Arch-Bishop of *Canterbury* deliver'd for sound Doctrine, that no Body had any Title to the Crown who was not unanimously elected by the whole Kingdom; and that if any of the deceas'd King's Family was more worthy than

than the rest, they ought more willingly and speedily consent to his Election: So that the deserving Persons of the Royal Family were only preferable to other Men of Merit. JOHN was afterwards depos'd for degenerating into a Tyrant, and LEWIS the French King's Son elected in his Room; but attempting to introduce ARBITRARY POWER contrary to the Terms on which the Crown was set on his Head, and for discovering a Design of extirpating the very Name of the English; he was by unanimous Consent of the Nation expell'd the Island, and HENRY the third elected to Reign. After him came EDWARD the first, tho' the House of LANCASTER always maintain'd, that his Brother Edmund was the eldest, only for the Deformity of his Body made incapable to wear the Crown. To EDWARD the first succeeded his Son EDWARD the second, who, growing an intolerable Tyrant, was in a Parliament summon'd by himself, formally accus'd of Misgovernment, and on his own Acknowledging the Truth of this Charge, solemnly depos'd. When his Son Edward the third was elected with universal Consent, Walter the Arch-Bishop of Canterbury preach'd the Coronation Sermon, and took these Words for his Text, *Vox Populi, Vox Dei, The Voice of the People, is the Voice of God*: So little did they Dream in those Days of the Divine Right of Monarchy; or that all Power did not originally derive from the People; for whom and by whom all Governments are erected and maintain'd. In this King's Life time, Richard the Son of the Black Prince was constituted the Successor; who after he came to reign, degenerated into a Tyrant, and was compell'd to resign the Crown and Government to the States of the Kingdom. Hereupon the Parliament elected Henry the fourth, who had no Hereditary Title (as he once pretended) from Henry the third, since there was still in Being the Issue of Lionel Duke of Clarence, third Son to Henry the third, whereas Henry the fourth was descended from John of Gaunt, the fourth Son. There was

an *Act* in his time to settle the *Succession*, whereby the *Crown* was limited to the *Heirs* of his *Body* and their *Issue* respectively, being after the *Extinction* of his *Family* to be dispos'd by the *States*. But it appears from what follow'd, and is evident from the *Nature* of the *Thing*, that such *Settlements* suppose, where they do not express the *Well-governing* of the *King*, that * *Parliaments* reserve a *Power* to * See *Ant-*
themselves of restraining the *Exorbitancy* of *Princes*, *glia Libe-*
and even deposing Tyrants. To *Henry* the fourth *rap. 177.*
succeeded his Son *Henry* the fifth, in the *Reign* of & *seqq.*
whose Son, *Henry* the sixth, there was made a new *Limitation* of the *Crown*; for tho' he had a Son living, yet it was enacted that he shou'd enjoy the *Crown* during his *Life*, and that *Richard* Duke of *York* shou'd be *Heir* apparent; that on the *Death* or *Resignation* of *Henry*, the *Crown* was limited in *Remainder* to *Richard* and his *Heirs*, with a *Proviso*, that if *Henry*, or any in his behalf, shou'd endeavour to frustrate this *Act*, that then *Richard* shou'd have the present *Possession* of the *Throne*. Accordingly the Duke of *York* attempted to possess himself of the *Crown* by *Virtue* of this *Act*, alledging that *Henry* had broke the *Conditions*; and his Son *Edward* did actually get himself created *King*, pretending to no other *Title* but what he had by the said *Act* of *Limitation*. *Edward* the fourth being driven out of his *Kingdom*, the *Parliament* did again intail the *Crown* on *Henry* the Sixth and the *Heirs* Male of his *Body*, with the *Remainder* to *George* Duke of *Clarence*, Brother to *Edward* the fourth, who was also declar'd *Heir* to *Richard* Duke of *York*. Thus you see all *Titles* of *Blood*, *Inheritance*, *Gift*, or *Conquest*, dispens'd with by *Acts* of *Parliament*; And *Election* not only the most frequent, but the most firm *Basis* and *Support* of the *Royal Throne*. Both the Houses of *York* and *Lancaster* paid such a *Deference* to the *Power* of the *People* as to claim by *Acts* of *Parliament*; and after *Edw. IV.* had recover'd the *Kingdom*, he got the *Law* repeal'd, which was made during his *Expulsion* and left the *Crown* to his Son *Edward* the fifth.
But

But his Uncle *Richard Duke of Gloucester*, having secur'd this Young Prince and his other Nephew in the *Tower*, and having persuaded the Nation they were not Legitimate, alledging that *Edward the Fourth* had another Wife living at the Time of his Marriage with their Mother, he was *elected King*, as Heir to *Richard Duke of York*, on whose Issue the Crown was *Intailed*, as aforesaid, by *Authority of Parliament*. But having barbarously Murder'd his Nephews, he was so universally detested for this Black Deed (tho' otherwise none of the worst Kings) that the Nation was resolv'd no longer to yield him Obedience; so they set up against him *Henry Duke of Richmond*, who had no Manner of Right in the World; or in case his Title had been good, yet his Mother was still living, tho' his Claim must be as her Heir. This he knew as well as any Body, and so neither relying on his own nor the Title of *Elizabeth* his Queen, much less on that of *Conquest* from the Victory which the People of *England* gain'd at *Bosworth-Field*, he procur'd himself to be confirm'd in his Kinghip by Act of Parliament, for avoiding (as that Law has it) of all *Ambiguity and Questions*; Whence it follows that this Prince believ'd an *Act of Parliament* could limit, transfer, supersede, or annul all other Titles whatsoever. In the 25th Year of the Reign of his Son *Henry the Eighth*, an Act pass'd wherein the Parliament say, *They were bounden to provide for the perfect Surety of the Succession*: And accordingly they entail the Crown on *Henry the Eighth*, and the Heirs of his Body by *Queen Anne*, and their Heirs according to the Course of Inheritance, and for Default of such Issue, to the Sons of his Body in like manner; and on the Failure of these to the Lady *Elizabeth*; after her to any other Issue in Tail; and then the Remainder is limited to the Right Heirs of *Henry the Eighth*. Some Years afterwards this Act was repeal'd, and the Parliament intail'd the Crown on the King, and the

the Heirs of his Body by Queen *Jane*. A Power is also given the King, in case he has no Issue, to dispose of the Succession by his WILL or LETTERS PATENT; Which shews, That *Henry the Eighth* was only a *Trustee* appointed by the Parliament; and it makes their Power to be the greater, that they can at Pleasure delegate it to another. There was afterwards an Act made, that after his Death, and the Death of Prince EDWARD, without Issue, the Crown shou'd descend to the Lady MARY and the Heirs of her Body, subject to such Conditions as the King should appoint; and on the Nonperformance of the Conditions, that the Crown shou'd go to the Lady ELIZABETH, as if MARY had been dead without Issue; and that if ELIZABETH neglected to fulfill the Conditions, then it shou'd go to such other Persons as the King should appoint. EDWARD the Sixth succeeded his Father, and took on him to dispose of the Crown (as the Author of *Hereditary Right*, insinuates the Q---- may do) by his last Will; being ill advis'd by his Ministers, who shou'd have got this done in Parliament: But this being *no* Act of the Nation, nor authoriz'd by their Representatives, his eldest Sister MARY succeeded; and after her the renown'd Queen ELIZABETH, according to the *Limitations* of the Statute made in the 35 *H. VIII.* 'Tis agreed by all, that one of the Sisters cou'd have no other Title but this *Act*; for Queen CATHERINE was alive when ELIZABETH was born. Now if her Marriage was unlawful, MARY was not Legitimate; and no more was Queen ELIZABETH, if the Marriage of Queen ANNE was not Valid. In the first Year of Queen *Elizabeth* the Parliament made a *Recognition* of her Title, founded on the before mention'd *Act of Limitation*, 35 *Hen. VIII.* In her thirteenth Year it was enacted, That if, *during her Life*, any Person claim'd a Title to the Crown for himself, or any other, or refus'd, on Demand, to acknowledge her Right, *he shou'd be disabled during his Life, to have*

.Q the

the Crown in Succession, as if he were naturally dead, &c. This Statute makes it also **TREASON**, during the Life of the Queen, and Forfeiture of all Goods and Chattels after her Decease, to affirm *That the Queen, with and by the Authority of Parliament, is not able to make Laws and Statutes of sufficient Force and Validity to limit and bind the Crown of this Realm, and the Descent, Limitation, Inheritance, and Government thereof; or that this, or any other Statute made by Parliament, with the Queen's Assent, is not, or ought not to be for ever of sufficient Force to bind and govern all Persons, their Rights and Titles, that may claim any Interest or Possibility in or to the Crown, in Possession, Remainder, Inheritance, Succession or otherwise.* There can be nothing more exprefs about the Power of Parliaments, with Relation to the Succession, and to shew the World that the Parliament of England, in the *Act for the further Limitation of the Crown*, (12 and 13 *VV. III.* and other Statutes to the same Purpose) was guilty of no *Innovation*, but only apply'd the *Fundamental Rules* of our Constitution to particular Persons, for those Ends which they are intrusted by the Nation, to promote and secure. In the 27th of Queen *Elizabeth* it was enacted, That all Invasions, Rebellions, or other Practices discover'd and adjudg'd against her, by, for, or with the Privy of any one who **PRE-TENDED** a Title to the Crown, all such Persons should be *excluded*, and disabled for ever to have, or claim the Crown. By Virtue of some Clauses in this Statute, *MARY* Queen of Scotland was afterwards executed; and her Son was so sensible of the Force of this Law, that he pretended to no Manner of Title during the Life of Queen *ELIZABETH*, who would never suffer him to be declar'd her Successor. The *Act of Recognition* made on King *James's* coming to the Throne, particularly insists on the *Act of Parliament* made in Favour of *HENRY* the Seventh, whereby he came in as Heir to that Entail, the Issue of *Henry* the VIII. being extinct in Queen *Elizabeth*. To King

James

James succeeded his Son *Charles* the First, the History of whose troublesome Reign and tragical Death is known to every Body. His Son CHARLES the Second enjoy'd the Crown for his Life; but there were several Attempts made to exclude his Brother the Duke of YORK from succeeding him. The Reasons for this Proceeding were so cogent, just, and universally convincing, that the Commons of *England*, in Parliament assembled, did pass their Bill; tho' the Artifices and the Influence of the Court, as well as the mistaken Notions of all the Bishops, and of some Temporal Peers, made it be rejected by the Lords. But the Evil Day was only put a little farther off, for in four Years and some odd Months Reign, he made such Havock of all Laws, drove so furiously at setting up *Papery*, and appear'd to be so firmly leagu'd with the King of *France*, the natural Enemy to *England*, that, at last, the whole Nation rose up in Arms against him, and call'd in the Prince of ORANGE to their Assistance; whereupon he abdicated the Government, which by the Convention of the States was settled on King WILLIAM and Queen MARY by the Act (before quoted, 1 *W.* and *M.* Sess. 2. cap. 2.) for declaring the Rights and Liberties of the Subjects, and settling the Succession of the Crown. 'This Act declares the Violation of the Rights and Liberties of the Subjects of *England* by the late King James and his Evil Counsellors, and their Design to extirpate our Religion, Laws, and Liberties, and settles the Crown upon King William and Queen Mary; Remainder to the Heirs of the Body of Queen Mary; Remainder to Her present Majesty and Her Heirs; and Remainder to the Heirs of King William, excluding all Papists, or Persons marrying Papists; in which Case, the Crown to descend to the next Protestant in the Settlement. The Administration was only in King WILLIAM, tho' Queen MARY was among us the acknowledged Heir of the late King; and tho' his other Daughter, Her present Majesty (then her Royal

Highness the Princess *Anne of Denmark*) shew'd a particular Zeal for the Protestant Religion, and no less Regard to the Liberty of her Country on the late *Revolution*; yet the Prince of *Orange*, by her MAJESTY's own Consent, was to reign before her. In the Year 1701, some time after the ever-to-be lamented Death of the Duke of *Glocester*, the Parliament made another *Act* (12 & 13 *Gul.* 3. Sess. 1. p. 2.) for the further Limitation of the Crown: Which settles the ' Crown, after the De-
' cease of King *William* and her present Majesty,
' upon the Princess *Sophia*, and the Heirs of her
' Body, being Protestants, provided each in that
' Succession join in the Communion with the
' Church of *England*, as by Law establish'd;
' and if not a Native of *England*, this Nation not
' to be oblig'd without Consent of Parliament to
' engage in any War for Defence of any Domini-
' ons not belonging to the Crown of *England*; and
' that none but *Natives* (except born of *English*
' Parents) shall then be Members of the Privy
' Council, or Parliament, or have any Place or
' Grant from the Crown. All Judges Commis-
' sions to be *quam diu se bene gesserint*; and no
' Pardon under the great Seal pleadable to an Im-
' peachment of the House of Commons." With
some other *Restrictions* and *Limitations*.

Not long after, an *Act* was pass'd (13 & 14 *Gul.* 3. c. 3) for the Attainder of the pretended Prince of *Wales* of *High Treason*. ' Which convicts him
' of High-Treason, for daring to proclaim himself
' King of *England*, records him to Posterity for a
' Traytor, bred up by the *French* King to introduce
' the *Romish* Superstition and *French* Government
' into these Kingdoms; sentences him to the same
' Pains of Death and Forfeitures as another Tray-
' tor, and makes it no less than *High Treason* for
' any *English* Subjects, who from and after *March*
' 1. 1701, shall hold any Correspondence with
' him, or remit or pay him any Money. The
' same Session (13 and 14 *W.* 3. c. 6.) Another *Act*
' was pass'd for further Security of his Majesty's
' Person

‘ *Person, and the Succession of the Crown, &c. which*
 ‘ *enacts the Oath of Abjuration, and makes it High*
 ‘ *Treason to prevent Her present Majesty’s Succes-*
 ‘ *sion to the Crown.*

Upon Her Majesty’s Auspicious Accession to the
 Throne, in the Session continued from the King’s
 Death, an † *Act* was pass’d to declare the Alterati- † 1 Anne
 on in the OATH of ABJURATION, &c. which c. 22.
 Oath runs as follows:

‘ I *A. B.* do truly and sincerely acknowledge,
 ‘ profess, testify, and declare in my Conscience,
 ‘ before God and the World, That our Sovereign
 ‘ Lady Queen ANNE is LAWFUL and RIGHT-
 ‘ FUL QUEEN of this Realm, and of all other
 ‘ Her Majesty’s Dominions and Countries there-
 ‘ unto belonging. And I do solemnly and sin-
 ‘ cerely declare, That I do believe in my Consci-
 ‘ ence, the Person pretended to be Prince of *Wales*
 ‘ during the Life of the late King *James*, and since
 ‘ his Decease pretending to be, and taking upon
 ‘ himself the Stile and Title of King of *England*,
 ‘ by the Name of *James the Third*, or of *Scotland*
 ‘ by the Name of *James the Eight*, or the Stile
 ‘ and Title of King of *Great Britain*, hath not
 ‘ any Right or Title whatsoever to the Crown of
 ‘ this Realm, or any other the Dominions there-
 ‘ unto belonging: And I do Renounce, Refuse,
 ‘ and Abjure any Allegiance or Obedience to him.
 ‘ And I do Swear, That I will bear Faith and true
 ‘ Allegiance to Her Majesty Queen *Anne*, and Her
 ‘ will Defend, to the utmost of my Power, against
 ‘ all Traiterous Conspiracies and Attempts what-
 ‘ soever, which shall be made against Her Person,
 ‘ Crown, or Dignity. And I will do my best En-
 ‘ deavour to disclose and make known to Her Ma-
 ‘ jesty, and Her Successors, all Treasons and Trai-
 ‘ terous Conspiracies which I shall know to be a-
 ‘ gainst Her, or any of Them. And I do faithfully
 ‘ Promise, to the Utmost of my Power, to Support,
 ‘ Maintain, and Defend the Succession of the
 ‘ Crown against him the said *James*, and all other
 ‘ Persons whatsoever, as the same is and stands

Settled [by an Act Intituled, *An Act declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown*] to Her present Majesty, and the Heirs of Her Body, being Protestants; And as the same [by One other Act, Intituled, *An Act for the further Limitation of the Crown, and better Securing the Rights and Liberties of the Subject*] is and stands Settled and Entailed, after the Decease of Her Majesty, and for Default of Issue of Her Majesty, to the Princess Sophia, Electress and Dutches Dowager of Hanover, and the Heirs of Her Body, being Protestants, And all these things I do plainly and sincerely Acknowledge and Swear, according to these exprefs Words by me spoken, and according to the plain and common Sense and Understanding of the same Words. without any Equivocation, Mental Evasion, or secret Reservation whatsoever. And I do make this Recognition, Acknowledgment, Abjuration, Renunciation, and Promise, heartily, willingly, and truly, upon the true Faith of a Christian. *So help me God.*

In the first Parliament summon'd by Her Majesty * 1 Annæ an Act was * pass'd for enlarging the Time for taking the Oaths; by which 'tis made HIGH-TREASON by any Over-Act to attempt to deprive or hinder the next in Succession to the Crown, according to the Two Acts of Settlement.

And here I shall, with Pleasure, observe, That the last Five Acts were pass'd, while the present Lord HIGH-TREASURER, who was Speaker of the House of Commons in Three successive Parliaments, fill'd the Chair of that House: And that his Lordship either was the FIRST, that Suggested to King William the Settling the Succession on the most Illustrious House of Hanover, or at least the Chief Promoter of it, in the House of Commons; where the Proposition was receiv'd with all Unanimity and Chearfulness. Every Body (says the Author of a Book † written upon that Occasion) began to ominate well to this Matter, when a Person of such acknowledged Learning,

† Anglia Libera, p. 50.

*Learning, and unparallel'd Ability in Parliamentary Affairs as Mr. HARLEY, the present Speaker, was observ'd occasionally to drop his Sentiments about it, some Days before it came to be the proper Business of the House: And afterwards one of the Members happening to mention our Danger from the Pretended Prince of Wales, if the Succession were left uncertain, the Speaker said, 'That he hoped in a little Time our infamous Distinctions and Parties, but particularly JACOBITISM, should be wholly abolish'd and extirpated; and that it was too great an Honour for that PRETENDED PRINCE to have his Name as much as mention'd in that Assembly.' To this I shall only, add, That the present Lord TREASURER valued himself so much on the great Share he had in the Second Act of Settlement abovemention'd, That, (I am inform'd) he caused his own PICTURE to be drawn by Sir Godfrey Kneller, with the Scroll of that very Act in his Hand. The Authors I contend with who it seems, had, free Access to his Lordship's Library; (which, indeed, is open to every Body) could not be Strangers to the Passages before-mention'd: But I leave them to tell the World, what Persons they have in their Eye, when they tell * us, 'That Queen Elizabeth's CHIEF * p. 211. MINISTERS, who had been most active in bringing the Mother (Q. Mary of Scotland) to the Scaffold, were not afraid to continue their utmost Endeavours to bring the Son to the Throne. So much more powerful was their Concern for the Interest and Welfare of their Country, than their Regards to their own private Safety and Advantage." The Meaning of this Insinuation is but too plain: But can the Authors of *The Hereditary Right* be so fond as to suppose, That the Persons who have been eminently Instrumental, in the Bringing about and Asserting the late *Happy Revolution*; in keeping out the Abdicated King; in Settling the Succession on the most Serene House of *Hanover*;*

In Attainting the Pretended Prince of *Wales* of *High Treason*; and in Engaging Both Houses of Parliament, both present and to come, all Judges, Magistrates, in short all Officers Civil and Military in *Great-Britain* and *Ireland* to renounce and ABJURE him by a *solemn Oath*: Can they, I say, suppose, That Men who have done all this, will ever be so void of Sense or common Prudence; (not to mention other Considerations) as to give up themselves, and the whole Nation to the Mercy of a *Popish* Prince, who has Suck'd in the Maxims of a *French* Government with his Milk; and whose Resentment would be the greater, in that he would return both with his own and his Father's *Injuries*: Which tho' Royal Clemency, and perhaps, Innate Good-Nature would Suggest him to forgive; Yet which a pious Duty, to the Memory of a Parent, and, (which ever prevails most with Princes) *Reasons of State*, would be sure to teach him to revenge, with the utmost Rigor?

But this is Putting Cases of Events that shall never happen; the *Legislature* having sufficiently provided against them, both by the Acts before-mention'd; and the following:

4 *Anne*, cap. 4. This Act Naturalizes the Princess *Sophia* and the Issue of her Body *exclusive of Papists*.

4 *Anne*, cap. 8. *An Act for the better Security of her Majesty's Person and Government, and of the Succession to the Crown in the Protestant Line.* This makes it High Treason to affirm by Writing or Print, That her Majesty is not Rightful *Queen*, or that the Pretended Prince of *Wales*, or any other Person, has Right, other than according to the Two Acts of Settlement; and Premunire to affirm the same by Word of Mouth. It enacts, that in case of her Majesty's Demise, the Parliament, Privy Council, and all the Officers Civil and Military then in being, shall continue Six Months, unless sooner altered by the Successor: That the Privy Council shall with all

all convenient Speed proclaim the next Protestant Successor, according to the said Acts of Settlement, on Pain of High Treason; and, That all Officers, refusing their Commands will incur the same Guilt. That if such next Successor be out of the Realm, the Archbishop of *Canterbury*, the Lord Chancellor, or Keeper, the Lord Treasurer, the Lord President of the Privy-Council, the Lord Privy-Seal, the Lord High-Admiral, and the Lord Chief Justice of the Queen's Bench for the Time being, shall be Lords Justices in the Name of the Successor, to execute all Acts of Government. That the next Successor may, during Her Majesty's Life, by Three Instruments under Hand and Seal, appoint other Persons, being Natives of *England*, to be added to the other Seven, of whom (not less than Five) may act; of which Three Instruments, the Successor's Resident shall have one, the Archbishop of *Canterbury* one, the Lord Chancellor or Keeper one; and if Her Majesty die without Issue, 'tis to be open'd in Privy-Council. If there be no such Nomination, then the other Seven Lords Justices shall act, but not dissolve the Parliament without the Successor's Direction.

5 *Anne, cap. 8. The Act of Union* enacts and confirms the Succession to the Monarchy of the United Kingdom of *Great-Britain*, according to the former Acts of Settlement.

6. *Anne, cap. 7. An Act for the Security of her Majesty's Person and Government, and the Succession of the Crown of Great-Britain in the Protestant Line.* It enacts the same Clauses of Treason and Premunire, and the same Oath of Abjuration in relation to the United Crown of *Great-Britain* in the Protestant Line, as the 4th of *Anne*, and that any Nomination of additional Lords Justices already made by the next Successor, shall hold good for *Great Britain*.

6 *Anne, cap. 14. An Act for the better Security of her Majesty's Person and Government, &c.* Enacts the taking the Oath of Abjuration by Officers

ficers in *Scotland*, as was before in *England*, and Refusers adjudg'd Popish Recusants convict.

6 *Anne*, cap. 23. *An Act for further Provision for the Election of Sixteen Peers in Scotland*: Enjoins all the Peers (Electors) to take the Oaths of Allegiance and Supremacy, and subscribe the Declaration, and take the *Abjuration Oath*; and enacts that no Person shall be admitted to vote at any Election for Members of Parliament, who refuses to take the *Abjuration Oath*, which may be tender'd by the Sheriff, or chief Person taking the Poll.

All we need to observe in relation to these wise *Provisions* for the Security of our *Religion*, *Laws*, and *Liberties*, is that the several Parliaments who enacted these Statutes, have acted according to the constant Practice of former Ages, and the Nature our our *Excellent Constitution*.

The Authors, I contend with, lay no small Stress on the Authorities of *Civilians* and *Lawyers* to maintain their *Hypothesis* either of an *Hereditary*, *Cessionary*, or *Testamentary Right*: But to deprive them at once of that WEAK, tho' plausible, *Support*, 'tis sufficient to observe, That all the Authorities they either do, or can possible alledge, relate only to the Children of private Persons; in which Case 'tis just and necessary to follow the Letter of the Law; But that in what relates to the Succession of a Crown, the Opinion of *Civilians* and *Lawyers* is of no Manner of Weight or Authority, any further than it is agreeable to the *Constitution*, or express Laws of each Particular Kingdom.

Let us illustriate this Important Point: 'Tis a Maxim receiv'd in all civilized Nations, where the Crown is *Hereditary*, That the Children who have a Right to it by Birth, are accounted the *Children of the Nation*; and this is the Reason why they are call'd by the Name of the Nation, and not by that of their Family. Thus in *France* they are call'd *Enfants de France*, and in *Spain* and *Portugal*, *Infanto's* or *Infanta's* of

of those Kingdoms: Because tho' the Right of Blood and Parentage takes Place in the Families of Princes as well as of private Persons, yet this Relation, or *Political Parentage*, by which Children acquire a Right to the Government of a Country proceeds from the Constitution of the Country it self, which they ought to govern by its establish'd Laws. Therefore tho' private Persons may deprive their Eldest Sons of the Right which they have by Birth to their Estates; yet this Sort of Disinheriting lies not in the Power of a Father either in *France, Spain, or Portugal*, without the exprefs Consent of the States; much less therefore with respect to the Kingdom of *Great-Britain*, where the *Hereditary Succession* is determined and limited by the *Laws*. The Nation has reserv'd to it self alone, the Right of providing for the pressing and extream Necessities of the State in *extraordinary Cases*; as when it has happen'd that the actual Possessor has overturn'd the Constitution and govern'd contrary to the *Laws*; or when the next Heir was found not to be endow'd with the necessary Qualifications for Government, then they call'd one of the other Branches, of the Royal Family, in whom they found such Qualifications, join'd with Proximity, of *Blood*, according to the *Fundamental Constitution of the Kingdom*.

This has already been proved to have been practis'd in *England*, on several Occasions; and is confess'd on all Hands: And as for the other Part of *Great-Britain*, I shall content my self with taking Notice, That *John Baliol* King of *Scotland*, was, with his Posterity, for ever EXCLUDED from the Crown, by Reason of his Mal-Administration; and thereupon the Royal Branch of the Family of *Stuart* was call'd to the Throne. Now if, according to the Authors I contend with, *Absolute Hereditary Right* ought to take Place, the Consequences are plain, none of the *Stuart* Line had a Right, to the Crown of *Scotland*, and so the very PERSON, whose

Title

Title they endeavour to assert, will stand excluded. What has already been said is abundantly sufficient to confute all the LAW-ARGUMENTS of our Adversaries. It would require more Time and Labour to rectify their Mistakes in Point of *History* and Matters of Fact: But as this is not altogether so material as the first; I shall only give the World a Sample of their *Cander* and *Sincerity*, in the single Instance of Bishop MERKS: Which Case I chuse before any other, because I may borrow the *Judicious Remarks* made already upon it, by

* Dr. a Learned * Divine.
 White. ' We have nothing remaining of Bishop Merks's
 Kennet ' Works, (says Dr. Kennet) and can judge
 in a Letter ' little of his Character, but that he was a
 to the Lord ' warm and turbulent Man; an Adherer to Ri-
 Bishop of ' chard II. after his *Abdication*, an Enemy to
 Carlisle. ' Henry IV. when legally establish'd on the
 ' Throne; nay, a Conspirator, and by Law ad-
 ' judged a *Traitor*, for no less than attempting
 ' to murder the King, and to promote a *French*
 ' Invasion: For that was the Form of his In-
 ' dictment, and a true Verdict found upon it,
 ' *Quod ipse & alii complures falsò, nequiter, &*
 ' *subdolè contra Ligeantias suas premachinantes,*
 ' *viis & modis quibus excogitari poterat, qualiter Do-*
 ' *minum Regem destruere possent, & MURDRARE,*
 ' *& Regnum ANGLIÆ cum INIMICIS NO-*
 ' *STRIS de FRANCIA de novo inhabitare----* And
 ' all this pro Domino RICARDO nuper Rege
 ' *Angliæ, qui antea pro malâ & iniquâ guberna-*
 ' *tione Regni Angliæ per omnes Status ejusdem*
 ' *Regni à regimine suo Regni prædicti non imme-*
 ' *rito depositus fuit.* [Rymer Acta Publ. Tom.
 ' VIII. p. 165.] One would think these Crimes
 ' of Plotting to murder a Crowned Head, and
 ' to bring in a *French* Army, were so base and
 ' unnatural, that none but a very Popish Pre-
 ' late could be guilty of them; and none but a
 ' *French* Writer, a *Maimbourg*, an *Orleans*, or
 ' so, could make any Apology for them. Yet
 ' this

' this *English* + *Gentleman*, who, I presume, † *The Au-*
 ' would be thought a Protestant, has now at this *Authors of the*
 ' Juncture made Bishop MERKS to be *the Man* Heredita-
 ' of *Conscience and Integrity*, p. 70. I hope none ry Right,
 ' of the Conspirators with the *French Fleet*, at &c.
 ' least none of the intended Assassins of King
 ' *William*, will ever come to have this Chara-
 ' cter given of them in *England*, tho' they have
 ' an equal Title to it. But, I do not intend to
 ' concern my self so much about this *Bishop's*
 ' Character, as about this *Gentleman's* misrep-
 ' resenting the History of him. He dwells much
 ' upon the bold *Speech* he made in Parliament,
 ' and publishes the Occasion and Copy of it from
 ' my Lord *Coke*, who did not so much as know
 ' the Bishop's Christian Name; and who indeed,
 ' though an Oracle of Law, did very little Ju-
 ' stice to History, It is to Me a Question whe-
 ' ther the Bishop made any such Speech. The
 ' Gentleman himself confesses, that *the original*
 ' known Authority upon which the Truth of this
 ' Story depends is *J. Hall's Chronicle*, written in
 ' *Henry VIII's Reign*: Whose Authority had
 ' been better, if either the Matter could be sup-
 ' supposed to have been within his own Know-
 ' ledge, or he had produced some Evidence for
 ' it. But it was near 150 Years after the Speech
 ' was delivered, and find no Heads, no Hint of
 ' it in any Writer who lived near the supposed
 ' Time of speaking; no, nor in the Reign of
 ' *Edward IV.* when upon that Return of the *York*
 ' Family, the Historians, and the very Acts of
 ' Parliament, did all that was possible to honour
 ' those who had been Traitors against *Henry IV.*
 ' If we go back to what we have of the Rolls of
 ' Parliament in that first Year of *Henry IV.* there is
 ' a Reference had to a great many Speeches, and
 ' very hot Words, that came from those Peers,
 ' who were soon after in Rebellion; but no Inti-
 ' mation of a Word spoken by the Bishop of *Car-*
 ' lisle, whose very Name is omitted in the Roll
 ' reciting all the Lords Spiritual and Temporal
 ' who

' *who voted at the Time Sir Edward Coke mention,*
 ' as this *Gentleman* is likewise pleased to confess.
 ' And therefore he need not have raised any Doubts
 ' about the Timing of the Speech in the Beginning
 ' or End of the Session, till he could first truly af-
 ' firm, that such a Speech there was, or to such Pur-
 ' pose, tho' we find nothing of it till near a Century
 ' and a half after the Speaker's Death. I suspect it
 ' was a Speech made for him in latter Times, and
 ' the rather because there are so many different Co-
 ' pies of it, every following Historian dressing it up
 ' in his own Oratory. Not that I am concerned
 ' whether there was any such real Speech or no; I
 ' am only sure the Authority for it is too dark and
 ' remote to build any thing upon it.

' I proceed to much grosser Mistakes of this
 ' *Gentleman* about the Bishop. He says, *It does*
 ' *not appear that any Judicial Proceedings were had*
 ' *against the Bishop for this Speech.* Why no, I hope
 ' there never will be any Judicial Proceeding a-
 ' gainst any Member of either House for a Liberty
 ' of Speech within Doors: And yet it seems this
 ' Bishop's denying the Right of the Prince in *Pof-*
 ' *session*, and presuming to speak in favour of one
 ' under a Parliamentary Exclusion, did not pass
 ' without Censure of the Lords, and a sort of Ju-
 ' dicial Proceeding in that House: For Sir Edward
 ' Coke affirms, that *for this Speech he was arrested*
 ' *by the Earl-Marshal, and committed to Custody.*
 ' But, if it be no great Fault in a *Gentleman* to af-
 ' firm uncertain Things, it is however less excusa-
 ' ble, if he assert for Truth what is demonstrably
 ' an Error. As at the Bottom of the same Page,
 ' when he says, *We are very well assured, that with-*
 ' *in two Months after Henry IV's Accession to the*
 ' *Crown, he was deprived of his Bishoprick of Car-*
 ' *lisle, and translated to a poor one of little or no*
 ' *Value, by the Pope's Authority.* For this he cites
 ' *Walsingham Hist. Ang. in Hen. IV. p. 364.* But
 ' what does *Walsingham* there assure him? That
 ' Bishop *Merks* was deprived of his Bishoprick of
 ' *Carlisle* by the Pope, or any Authority of the See
 ' of

' of Rome? No! he only says he was translated by
 ' the Pope, which I think, proves him not depri-
 ' ved; for then he had not been properly *transla-*
 ' *ted*, however again promoted. But does *Walsing-*
 ' *ham* exprefs that Removal to have been *within*
 ' *two Months* after Henry IV's Accession to the
 ' Crown? No, not a Word of the Time, and by
 ' undoubted Records we know the Time better.
 ' That King's Accession to the Crown is computed
 ' from Sept. 30. 1399: So that two Months after it
 ' carries us no farther than the Beginning of *De-*
 ' *cember* in the same Year. And yet we find him act-
 ' ually Bishop of *Carlisle* (neither deprived nor
 ' translated) above five Weeks after this, even
 ' when he was committed for High-Treason on the
 ' 10th of *January* following. The Words of the
 ' Warrant that Day to the Constable of the Tower
 ' are, *Mandamus vobis quod Thomam Episcopum*
 ' *Karleolensem, & Rogerum Walden Clericum*
 ' *recipiatis*---- T. R. *apud Westmon. X Januar.*
 ' *Reg. 1. 1399.*) where by good Luck he is joined
 ' with a deprived Bishop, *Roger Walden* deprived
 ' of the See of *Canterbury*, and therefore called
 ' *Roger Walden Clerk*, to teach us, that had the
 ' Bishop of *Carlisle* been at this time *deprived*, he
 ' would have been simply stiled *Thomas Merks*
 ' *Clericus*; or had he been translated, he would
 ' have had the Title of his new See.

' Yet the Gentleman upon this one Mistake runs
 ' into many others. He makes *this early Depriva-*
 ' *tion from his Bishoprick, to have been before the*
 ' *Treason for which he was indicted.* And I wish
 ' indeed, for the Bishop's Honour, it had been so.
 ' But Matters of Fact are stubborn Things, and no
 ' Fact can be more certain, than that his See was
 ' full of him, while between *December 6,* and *Jan-*
 ' *uary 10,* he had committed several Treasons, and
 ' was put into Custody for them. Nay, I doubt
 ' not but he continued actual Bishop to the very
 ' Time of his Trial and Conviction. For 18 Days
 ' after his Commitment, when his Trial was com-
 ' ing on, the King sent a Writ of Instruction to the
 ' Judges

' Judges how to proceed in the Indictment of any
 ' Archbishop or Bishops, and ordered the legal and
 ' accustomed Course to be taken, without Regard
 ' to their Spiritual Function, by which 'tis plain he
 ' meant the Case of Bishop *Merks* then to be
 ' brought upon his Trial. This was dated at
 ' *Westminster*, xxviii. *Januarii*, Reg. 1. [*Rymer.*
 ' *Acta Pub.* viii. p. 123.] The Gentleman under-
 ' takes to say farther, That this *early Deprivation*
 ' is to be attributed to no other Cause besides the Li-
 ' berty he took in his Speech, or his Refusal to do Ho-
 ' mage to Henry IV. When 'tis plain there was no
 ' such Effect, I will not dispute with him the Causes
 ' of it; yet he is unlucky in assigning such Causes
 ' as, were the Effect true, would make directly a-
 ' gainst him. If deprived for the *Liberty of Speech*,
 ' then methinks there was a *judicial Proceeding* a-
 ' gainst him for that Speech; which the Gentleman
 ' has just before flatly denied: If it were for Re-
 ' fusals to do Homage to Henry IV. as nothing appears
 ' like it, so I doubt such Refusal (however crimi-
 ' nal in the King's Courts) would not have served
 ' as a Canonical Reason for the Pope to have depri-
 ' ved him. It is well known that the same Pope's
 ' Deprivation of Archbishop *Walden*, was for an-
 ' other Cause.

' The Gentleman goes on to another notable Fan-
 ' cy; says he, *It may be here observed how highly*
 ' *the Pope favoured Henry IV's Title*, since he de-
 ' prived Bishop *Merks* for not submitting to him, and
 ' that contrary to an expresse Act of Parliament made
 ' by Richard II. against Translations of Bishops by
 ' the Papal Authority. In this one Observation,
 ' the Mistakes are almost as many as the Words.
 ' The Pope did not favour Henry IV's Title till he
 ' was warm in his Throne, and able to support his
 ' own Title; nay, not till he had purchased his Fa-
 ' vour by the Persecution of Hereticks, and shed-
 ' ding the Blood of the poor *Lollards*. And the
 ' Pope's Clergy were much more inclinable to the
 ' abdicated Prince *Richard II.* and were forward
 ' in most of the Stirs and Rebellions against Henry

IV.

'IV. and may, if the *Gentleman* please, be called
 'Sufferers for their Loyolty. An Archbishop of
 'Canterbury disgraced and deprived, an Archbi-
 'shop of *York* sentenced and beheaded for Treason,
 'Bishop *Merks* found guilty of the same Crime; a
 'Bishop of *Norwich* begging the King's Pardon;
 'an Abbot of *Westminster* so afraid of the Disco-
 'very of his Treasons, that he died of that Fear;
 'and at least two Secular Priests hang'd for Ac-
 'complices with Bishop *Merks*, one of which,
 'Mawd or Mawdlin, was (for ought I know) the
 'first PERKIN in this Kingdom, and took upon
 'him to personate the absent King *Richard*. All the
 'History of that Reign of *Henry IV.* makes it evi-
 'dent, that he had not so much the Hearts of the
 'Clergy, nor indeed of the Nobility, as he had of
 'the Commons and People of *England*, who in
 'those Days understood what it was to be deliver'd
 'from Tyranny and Oppression. Our late Revolution
 'was much more happy in being the universal Voice
 'of the Nation; and wherein the Prelates and
 'Clergy (for the greater Part) had as much Hope
 'and Joy as any other Body of Men. But to re-
 'turn to the *Gentleman* and his unlucky Observa-
 'tion: If the Pope deprived Bishop *Merks*, (for
 'which I never saw any Authority, and he brings
 'none) it could not be barely for *not submitting* to
 'the King before he broke into Rebellion, but it
 'must be after his Treasons, nay after his Trial and
 'Conviction; till when he was Bishop of *Carlisle*,
 'as the Records expressly call him. Nor did the
 'Pope in this Matter use any *Papal Authority con-*
 'trary to express *Act of Parliament against Transla-*
 'tions of Bishops: For I dare be confident the Pope
 'did not translate him to any See in *England* or
 '*Wales*; if he had so done, we should have heard
 'of some Bulls, or other Token of it. And it is
 'best for the *Gentleman's* Argument, that the Pope
 'did not translate him: For certainly it would be
 'an odd Instance of the Pope's Favour to *Hen. IV.*
 'that his Holiness, against the King's Will, tran-
 'slated a Bishop that would not submit to him, and
 R this

' this not only in Defiance of the Royal Pleasure,
 ' but of an exprefs Act of Parliament. I must beg
 ' this *Gentleman* and his Friends to know, that in
 ' the darkeſt Times of Popery, our Engliſh Fore-
 ' fathers would not ſuffer the Pope in *England* to act
 ' any thing contrary to exprefs Acts of Parliament :
 ' And at this Juncture of *Henry IV's* Acceſſion to
 ' the Throne, the two Houſes of Parliament were
 ' the fartheſt from conniving at any ſuch Breach of
 ' Statute; for the Violation of Statutes was now
 ' charged as the main Grievance in the late Reign of
 ' *Richard II.* and was to be redreſſed and effectually
 ' prevented for the Future.

' Our Hiſtories and Registers know nothing of
 ' ſuch *Translation* of Biſhop *Merks*. *Roger Walden*
 ' indeed, after his Deprivation from the See of
 ' *Canterbury*, was tranſlated (if the *Gentleman* will
 ' ſo call it) to *London*; but this after he was fully
 ' reconciled to the King, and by the King's Favour
 ' rather than the Pope's. And we have ſo much
 ' Proof of this Tranſlation, or rather new Promo-
 ' tion of *Walden*, that had the like happened to
 ' Biſhop *Merks*, it is very ſtrange that there ſhould
 ' not be the leaſt Footſtep of it in any of our Ci-
 ' vil Records or Eccleſiaſtical Registers, as far as I
 ' could ever ſee or hear of, and I have ſeen or
 ' ſearch'd for moſt of them pertaining to Church
 ' Affairs.

' The *Gentleman* again is angry, that Dr. *Higden*
 ' ſhould ſuppoſe, That Biſhop *Merks* pleaded the
 ' Pardon of *Henry IV.* for that Conſpiracy againſt
 ' him. Says the *Gentleman*, in big Words, But
 ' how comes the Doctör to know, that Biſhop *Merks*
 ' ever pleaded *Henry IV's* Pardon? In what *VVri-*
 ' ter or Hiſtory is it to be found? And after a little
 ' more Inſult, he is pleaſed to add, *Ve* are yet to
 ' ſeek for Authority for this Piece of Hiſtory. Whe-
 ' ther he has ſought, or whether he be willing to
 ' find, I cannot tell: But I found it very clear and
 ' plain beyond all Exception, upon the original
 ' Roll of his Trial and Diſcharge, that on the
 ' *Wednesday* next after the Feaſt of the Conver-
 ' ſion

‘sion of *St. Paul*, 2 *Hen. IV.* 1400. the said *Thomas Merks*, late Bishop of *Carlisle*, came before the King (*i. e.* in his Court at *Westminster*) and ‘surrendred himself to the Prison of the *Marshalsea*; and then being ask’d if he had any Thing to ‘say why the Court should not proceed to Judgment against him, he alledged (or pleaded) the ‘special Pardon of the King granted to him of all ‘Treasons, Murders, &c. and produced it, dated ‘the 28th Day of *November*, in the second Year ‘of the Reign of King *Henry IV.* and so was discharged----- *Dei Mercurii proxime post Festum ‘Conversionis Sancti Pauli, dictus Thomas Merks ‘nuper Episcopus Carleol, &c. ----- Rot. 4. An. 2. ‘Hen. IV.* I think in this judicial Cause, there can ‘be no better Authority than this Record of the ‘Court to prove, that the late Bishop *Merks* in ‘Person being brought to Judgment, did plead his ‘Pardon; which Pardon produced by him was admitted by the Judges, and he was thereupon discharged.

‘The Gentleman proceeds to a very strange Supposition, That if Bishop *Merks* did accept and ‘plead the Pardon of *Henry IV.* yet he did not ‘thereby submit to him, nor acknowledge his Authority. Says he, *What is the Consequence the ‘Doctor would draw from thence? Does it follow ‘that he thereby acknowledged him to be a rightful ‘King, or engaged himself to be his true and faithful ‘Subject for the future? Yes certainly, if the King ‘were wise and the Bishop honest; or else the ‘Royal Mercy was a Jest, and the Bishop’s Plea ‘of it was a great Wickedness. A very dangerous Doctrine for the Princes he calls de facto, ‘that if they grant a Pardon to a Man for Treason, ‘and that Pardon be accepted and pleaded, yet ‘that Man has his Life given, with a Liberty to ‘commit more Treason. Farewel Policy, Equity, Gratitude, and all manner of Conscience! ‘No Security, but never to pardon such sort of ‘Men.*

R 2

‘Yet

' Yet the *Gentlemen* insists upon it, That tho' the
 ' Bishop's Life was saved by the King's Mercy, this
 ' did not oblige him to be a good Subject, because
 ' there was no such Condition inserted in the Par-
 ' don. Says he, with an Air somewhat imperious,
 ' *It may be the Doctor thinks, there could be no other*
 ' *Motive for this Pardon, but only the Assurance he*
 ' *had given Henry IV. of becoming his good Subject*
 ' *for the future. But why then was it not inserted in*
 ' *the Pardon? Why was that Reason omitted? Why,*
 ' I presume, because in the current Forms of Par-
 ' don no such Assurance was ever before inserted:
 ' Nay, if any such Covenant or Condition were
 ' inserted, it would not be a free Pardon, nor
 ' perhaps valid; for I think I have heard the
 ' Lawyers say, *A Pardon is void if it be conditio-*
 ' *nal, and not absolute and full.* If so, it was better
 ' for the Bishop that this Reason *was omitted*, and
 ' left upon his own Conscience to be sufficiently
 ' implied and understood. I hope it is true in Law,
 ' because very just and reasonable, that in Pardons
 ' of Grace and Favour, the Receiver's Submission
 ' and good Behaviour for the future is expected
 ' and required, tho' not specified in the Pardon:
 ' And I believe the Statutes have confirmed the
 ' Common Law in this Point, that upon Pleading
 ' of a Pardon, there must be Surety given of good
 ' Abearing, otherwise the Act of Grace would not
 ' have its due Course and Effect. Nay, if a Man
 ' plead a particular Pardon, he must have a Writ
 ' of Allowance, (saith Sir *Mat. Hale*, *Pleas of the*
 ' *Crown*, p. 252.) *qui il ad trouve Surety som'. Stat.*
 ' 10. Ed. III. And what if, after all this *Gentle-*
 ' *man's* Surmises, Bishop *Merks* had the Wit to
 ' take Care that his Pardon should have a legal
 ' Effect, by finding *Sureties for his good Abearing,*
 ' *i. e.* his living in Submission and due Allegiance to
 ' Henry IV? This again is in the very Record of
 ' his Trial and Release----- *Episcopus dimissus datis*
 ' *Manucaptoribus, quod ipse a modo bene se gerat;*
 ' giving Mainprise, or having good and sufficient
 ' Sureties bound for him, that from henceforth he
 will

'will behave himself well, *i. e.* never be again a
'*Traitor and Rebel.* And what more justifies the
'*Bishop* than any of those *Gentleman's* wrong
'and false Suggestions, he kept the Faith and Secu-
'rity given to the Time of his Death, which hap-
'pened soon after.

'The *Gentleman* does another great Injury to the
'*Bishop's* Ashes, by making *Walsingham* say ex-
'pressly, *That when Bishop Merks's Party was de-*
'*feated, King Richard was so mortified at the News*
'*of that Misfortune, that (as was reported) he vo-*
'*luntarily famished himself.* For this he quotes not
'only *Walsingham*, but *J. Hall's Chronicle*; when
'yet neither of those Historians say one Word of
'*Bishop Merks's Party being defeated.* Tho' he
'was deep in the Conspiracy, yet we know not that
'he was actually in Arms, much less at the Head of
'a Party in Arms. However, the *Defeat of his*
'*Party* could make no Impression upon the Mind
'of *King Richard*; for the Bishop was in safe Custody
'above a Month before *K. Richard's* Death; and
'the Rebels that continued some Time after in Arms
'till they were *defeated*, were by no Means to be
'called *Bishop Merks's Party.* It is very remarka-
'ble, that this *professed Advocate of the PRE-*
'*TENDER* should be so much like his Master, and
'have such evident Tokens of *Suspicion* and ill-
'grounded Pretension in him. But indeed the De-
'fence of any Cause depends so very much upon
'the Merit of it, that I never knew an ill Cause un-
'dertaken, but that, however artfully manag'd, it
'betray'd its own Weakness in the wrong Turns
'and false Suggestions which an *Advocate* is forc'd
'to use for it. I could give abundant Proofs of this
'Connexion of a Cause, and the Patron or Pleader
'of it, in this *Gentleman* and his *Hereditary Right*;
'but I promised to keep only at present to this
'single Instance of *Bishop Merks*; of whom, to
'serve his Turn, this Writer has made a Story,
'and cover'd it with a Show of History, and Re-
'cords, when we find Error and Mistake not only

‘ in the Whole, but in every particular Circum-
‘ stance of it.

‘ The plain History of Bishop *Merks* seems to
‘ be directly contrary to what this *Gentleman*
‘ labours to represent it. This *Thomas Merks*
‘ had been a Monk of *Westminster*, and was by
‘ King *Richard* preferred to the See of *Carlisle*
‘ in the twenty first Year of his Reign; when
‘ Archbishop *Arundel* was violently driven from his
‘ See of *Canterbury*, and an Intruder, *Walden*, put
‘ into it; and when most of the exorbitant Acts of
‘ that Reign were done within the Compass of the
‘ same Year. And therefore the Monks of *Car-*
‘ *lisle*, who had the Right of electing a Bishop,
‘ opposed this Brother *Thomas*, as suspecting he
‘ was recommended with some ill Intention, at
‘ that Time of a general Corruption of the Court;
‘ and it was with great Difficulty that they were
‘ at last over awed to chuse him. This put him
‘ into the Interest of the great Lords, who about
‘ the same Time were advanced to extraordina-
‘ ry Honours; particularly of *Edward* Earl of
‘ *Rutland*, created Duke of *Albemarle*; *Thomas*
‘ *Holland*, Earl of *Kent*, Duke of *Surrey*; and
‘ *John Holland*, Earl of *Huntingdon*, made at the
‘ same Time Duke of *Exeter*; the three Peers,
‘ who being more especially obnoxious to a free
‘ Parliament, broke into open Rebellion against
‘ *Henry IV.* and seem to have drawn their
‘ Friend and Creature the Bishop into the Snare
‘ with them: Tho’ the Bishop had another strong
‘ Motive to take that Side, upon his private and
‘ personal Obligations to King *Richard*, being
‘ advanced by him from a Monk to a Secular
‘ Prelate; and being in so much Confidence and
‘ Favour with him, that the King named him one
‘ of the Executors of his last Will and Testament,
‘ dated the 16th of *April*, 1398; and in the
‘ next Year seems to have carried him along
‘ with him into *Ireland*, among several other
‘ Bishops that he prest to attend him in that
‘ Expedition. And this possibly is the Reason
‘ why we do not find him in the last Parliament

or Convention of *Richard II.* being than in
 Service and Attendance upon the King's Person
 in the West. Nor do we so much as find him
 mentioned in the first Parliament of *Henry IV.*
 tho' we have an expresse Roll of the Names of
 the Lords Spiritual and Temporal, then pre-
 sent upon the chief Day and main Business, that
 of disposing the Person of King *Richard*; the
 very Time when they father the notable
 Speech upon him; when yet, if the Roll be
 true, he must have spoke in his Absence and
 by Proxy, (*Rot. Parl. 1. 1 H. 4. n. 73. correct*
ly printed in Brady's Ric. II. Append. 132.)
 There is indeed one Authority unknown to the
 Gentleman, that, if true, must prove the Bi-
 shop of *Carlisle's* Attendance in Parliament 1
Hen. IV. and that is an Extract I have by me
 from the Register of *Scrope* Archbishop of *York*,
 running thus; *Die Dominica xix. Octob. 1399.*
in capella hospitii Archiepiscopi Ebor. apud Lon-
don juxta Westm. in Parlamento primo Henrici
quarti, Thomas Sumesten Episcopus Karleolensis,
dudum Monachus Westmon. personaliter constitu-
tus, Domino Archiepiscopo Eboracensi Metropoli-
tano suo ejusque Successoribus obedientiam &
fidelitatem prestat, Presentibus tunc ibidem
Abbate Westmon. &c. This Memorandum,
 if rightly taken, must be meant of Bishop *Merk*,
 who it seems likewise went by another Name,
 that of *Sumestan*. He is here in Presence of
 his old Governor the Abbot of *Westminster*,
 who had likewise gone with King *Richard* in-
 to *Ireland*, as *Walsingham* affirms, (*Hypod Neustr.*
p. 553.) and was in the first Plot against *Hen-*
ry IV. and perhaps the Instrument of drawing
 in the Bishop his late Brother and Pupil. Up-
 on which I must needs observe, that tho' this
 Gentleman makes the Bishop's Adherence to
Richard II. to be all Loyalty and sworn Alle-
 giance, and to render him what he calls *so glo-*
rious an Example of Fidelity and Fortitude; yet
 in Truth it was his own Dependencies and his

own Interests that carried him to espouse the Cause of King *Richard*, and to oppose that of King *Henry*, to whom, in a free Parliament, he must have been answerable, for having been made so considerable a Tool of the late *Arbitrary Reign*, and the *Mal-Administration* of it.

However, if he were present in the Parliament 1 *Hen. IV.*, it is very probable he might speak to second some of the discontented Peers, (and yet in the Records and Reports of that Parliament we have no Proof of his speaking, nor of his appearing in it;) but I dare say we have no authentick Copy of that *Speech*, however the late Writers are pleased to flourish with it. Dr. *Brady*, who is pleased to assign the Delivery of it upon propounding the Question, *What shall be done with King Richard?* On Thursday 23 Octob. (when yet in the Names of the Bishops then present, the Name of the Bishop of *Carlisle* does not occur) takes the Copy of it as found in the First Part of *Sir John Hayward's Life of Henry IV.*, printed at London 1599, which is a modern Harangue, and a Piece fitter for *Romance* than *History*.

Whatever this *Gentleman* fancies, the Pope never concerned himself about that *Speech*, nor could he possibly deprive the Bishop upon that Account; for he was actually and legally a Bishop, not only for *Two Months*, within which the *Gentleman* gives him a Papal Deprivation, but for four Months after the King's Accession to the Crown. He was Bishop of *Carlisle* when he acted the Treason, when he was committed to the *Tower* for it, nay while he was Arraigned, and till he was Convicted. His Tryal began on Tuesday before Candlemas, 1 *Hen. 4.* in the City of London, when before *Thomas de Beauchamp*, Earl of *Warwick*, and other the King's Justices, it was presented upon the Oath of Twelve Men, That *Thomas Merck* Bishop of *Carlisle*, and others, had conspired

' Inspired against the King, &c. upon which the
 ' Justices sent a Precept to the Constable of the
 ' Tower to bring the Body of the said Bishop be-
 ' fore them on the *Wednesday* following; and
 ' being accordingly brought, he pleaded that he
 ' was a consecrated Bishop, and by the Law of
 ' the Land was not bound to answer them: But
 ' this Plea not being admitted by the Judges, the
 ' Bishop making a Protestation of saving the Ec-
 ' clestial Liberty and his Episcopal Privilege,
 ' put himself upon being tried by his Country;
 ' and the Jury brought in a Verdict the same Day,
 ' that the said Bishop was *Guilty* of the Treasons
 ' and Felonies aforesaid, committed from the Feast
 ' of *St. Nicholas* the Bishop last past to the Feast of
 ' the Circumcision of our Lord, and before and
 ' after. Judgment was not then given by the
 ' Justices, but the Bishop was remitted to the
 ' said Prison of the *Tower*, there to be kept in
 ' safe Custody. *Rot. 4. 2 H. 4.* This is Demon-
 ' stration, that the Bishop was not deprived from
 ' this See and translated to another within two
 ' Months after the King's Accession to the
 ' Crown, as the *Gentleman* so positively asserts;
 ' when at the four Months End he was impleaded,
 ' tried, and convicted, under the Style of *Bishop of*
 ' *Carleol.*

' The *Gentleman* indeed offers an Authority
 ' for the earlier Deprivation of Bishop *Merks*,
 ' because, says he, we find the Temporalities of
 ' *Carlisle* were ordered to be surrendered to *Wil-*
 ' *liam Strickland* 15 Nov. primo *Henrici Quarti*,
 ' 1399, citing for it *Rymer* viii. p. 106. Were this
 ' literally true, Bishop *Merks* must have been
 ' deprived within one Month after the King's
 ' Accession to the Crown; for the Election, Con-
 ' firmation, and Consecration, besides allowing
 ' Time for the Pope's Bulis, could not have been
 ' otherwise dispatched for the Restitution of the
 ' Temporalities to a Successor by the Middle of
 ' *November*. The Mistake is only of one whole
 ' Year, that Writ for restoring the Temporal-
 ' ties

' ties to Bishop *Strickland* was not in 1399, 1
 ' *Hen. 4.* but in 1400, 2 *Hen. 4.* as all our Re-
 ' gisters agree. And so run my Notes from the
 ' Tower Records, before I saw that useful Work
 ' of Mr. *Rymer*. *Temporalia restituta Willielmo*
 ' *Stryckland, Episcopo Karl. 15 Nov. 2 Hen. 4.*
 ' (*Pat. 2. H. 4. Rot. 19.*) The Gentleman can
 ' say, that in Mr. *Rymer's* Print, *An. 1 Hen.*
 ' *4. 1599*, is set in the Margin; but an Error
 ' of Misprint can be rectified by any judicious
 ' Reader, and Mr. *Rymer* himself would have
 ' helped him to correct it. For he places that
 ' Writ after several others, dated the End of
 ' November 1399, and December and March fol-
 ' lowing. And this Writ of Restitution was af-
 ' ter them in order of Time, as well as Place:
 ' Not going backward to 1399. 1 *Hen. 4.* but
 ' proceeding to 2 *Hen. 4. 1400.* Bishop *Strick-*
 ' *land* having been consecrated on the 15th of
 ' August this Year, as in the *York Register* of
 ' Archbishop *Scrope*. *In Festo Assumptionis Be-*
 ' *atae Mariae, Anno 1400, Willielmus Strickland*
 ' *Electus Karliol. consecratur Episcopus per Ri-*
 ' *cardum Archiepiscopum Ebor. in capella castri de*
 ' *Cawode.*

' His Predecessor *Merks* is never called Bishop
 ' of *Carlisle* after he was found Guilty of High-
 ' Treason; from thenceforth (and not before) he
 ' was dead in Law, and legally stiled *Thomas nu-*
 ' *per Episcopus*, as in the Warrant for removing
 ' him from the Tower of *London* to the Abbey of
 ' *Westminster*, 23 June 1400, (*Rymer* viii. p. 150.)
 ' and in the Grant of his Pardon 28 Novemb. next
 ' following, (*ibid.* p. 164.) And in the mean time
 ' the Writ for a new Parliament, dated ix Sept.
 ' 1400, was directed, *Custodi Spiritualitatis Epif-*
 ' *copatus Karliol. Sede vacante.*

' Whether *Merks*, while he lay under a Verdict
 ' of guilty of Treason, was formally deprived by
 ' the Pope, for a Show of preserving the Rights of
 ' the Church, or for a Political Turn of comply-
 ' ing with the King's Desire, I know nothing, be-
 ' cause

" cause I read nothing of it. If there be any such
 " Notice in the Registers of the See of *Carlisle*,
 " and that will be a further Demonstration of this
 " Gentleman's Mistake, " That he was deprived be-
 " fore he committed any Treason, and within two
 " Months after the Accession of King Henry IV. to
 " the Crown, and that within the same time he was
 " likewise translated by the Pope contrary to express
 " Act of Parliament.

" *Walsingham* does affirm, that the Pope transla-
 " ted him to another Bishoprick, from which he
 " could receive no Fruits or Revenues: *Papa tran-*
 " *stulit Episcopum Karleolensem ad Episcopatum ali-*
 " *um, unde nec fructus perciperet nec proventus.*
 " This the Gentleman takes to be an English or a
 " Welsh Bishoprick of little or no Value, and makes
 " the Translation a Breach of an Act of Parlia-
 " ment: Not considering that this Translation was
 " but giving him a new Name to a titular See, or
 " Shadow of a Bishoprick in *partibus Infidelium*, a
 " common Stratagem of the Popes of Rome, and
 " no Breach of the English Laws, which were not
 " concerned in that Matter. This nominal See is
 " said by Bishop *Godwyn* to have been that at *Samos*
 " in Greece, and he justly calls it *Translationis Lu-*
 " *dibrium*, a Jest of being translated by the Pope.
 " It was so far from supporting Bishop *Merks*,
 " that it broke his Heart, for he died soon after;
 " and the Historian expressly observes, that he died
 " of Sorrow or Fear rather than of Sicknes. And
 " his Memory was never had in any Reputation till
 " after the coming in of the *York* Family, when it
 " was Party-Rage to cry up all who had opposed
 " the House of *Lancaster*. And even then they
 " could say no Good of him, but gave him the ge-
 " neral Character of a stout Man, and instead of
 " his Actions prove it by a Speech never recorded,
 " and, as we have reason to think, never delivered.
 " The greatest Certainty we know of him is,
 " that he was in the Plot for murdering the King,
 " and for bringing over a French Navy and Army
 " against a Prince in Possession and Parliamentary
 " Right

' Right, to have restored an abdicated Prince, who
 ' must have ruined the Constitution; and yet this
 ' Prelate at this Juncture is called a *Man of Inte-*
 ' *grity and Honour*. It would raise the Indignati-
 ' on of any *English* Heart to have such a Character
 ' given of a *vile Traitor* by the Laws of God and
 ' the Land, conspiring against the King's Life, and
 ' calling in a *Foreign FRENCH POWER*, the
 ' worst of Traitors to his King and Country.

' But, the *Gentleman's* Character of him is no
 ' more to be trusted than his History of him, which
 ' is not only partial, but mistaken almost in every
 ' Particular. I must leave the *Readers* to judge of
 ' his other Facts by what appears in this single In-
 ' stance: Nor have I Leisure to point at the Prin-
 ' ciples of his Book, which are likewise very extra-
 ' ordinary; as, "That an Oath to the Possessor of a
 ' " *Crown does not bind in Conscience against the*
 ' " *right Heir.*" A Way, in his own Meaning, to
 ' absolve Her Majesty's Subjects, or to teach them
 ' to swear with such Equivocation and Reserve as
 ' I think to be very damnable. Again, "That there
 ' " *is no Legislative Authority under a King de facto,*
 ' " *nor are Acts of Parliament then valid without the*
 ' " *Confirmation of the King de Jure.*" Which is, by
 ' his Scheme, to repeal or annul all our Acts of Se-
 ' curity for the *Protestant* Succession, till a *Popish*
 ' Pretender shall be pleased to confirm them. Far-
 ' ther, he is very terrible upon those Princes, who
 ' upon his Supposition are *Usurpers*; and yet he
 ' has this Salvo, that "It is not the bare Act of Seiz-
 ' " *ing and Filling a Throne, but the Will of the Posses-*
 ' " *sor, that must denominate him an Usurper;*" i. e.
 ' if the wrong Possessor have in himself a secret
 ' Will to restore the Crown to the right Heir,
 ' than his Usurpation is sanctified by his good In-
 ' tention. He has many other Principles and No-
 ' tions, which would unsettle all Monarchies, and
 ' utterly destroy this of *Great Britain*. He has
 ' mixed them indeed with some other Principles,
 ' to which I can agree, because they are true and
 ' inconsistent with his own Pretensions of *Heredi-*
 ' tary

' tary Right; as that a very mean Genius, and mani-
 ' fest Inabilities for Government, may be good and
 ' sufficient Reasons to keep a next Heir out of the
 ' Throne, p. 30. This makes me think of the Re-
 ' port, that Mr. Lesley from abroad has lately com-
 ' plained of a very obstinate and untractable Man
 ' that does not understand Duty or Interest, &c.
 ' But, however, I think a moral Incapacity is worse
 ' than a natural; and I hope our Laws will always
 ' continue to incapacitate every Papist from assu-
 ' ming the Government of this Protestant Church
 ' and Nation. He comforts me again with laying
 ' it down, That there may be rightfnd Successors, tho'
 ' they be not the next Heirs by Blood to the Crown,
 ' p. 21; which I think indeed agrees with the Con-
 ' stitution of our Hereditary Monarchy. Again, he
 ' affirms very honestly, that There was anciently a
 ' Power in the Crown to interrupt the Lineal Suc-
 ' cession by the Exclusion of the Right Heir. I be-
 ' lieve there was; but I believe likewise that there
 ' was never any Power in the Crown so great, but
 ' that it is now as great in the Legislature. But it
 ' seems this Gentleman, with his Eye directly on
 ' the Pretender, thinks the last Will and Testa-
 ' ment of an English Monarch may dispose of the
 ' Crown better than an Act of Parliament. For,
 ' says he, it was the usual Custom, i. e. the Common
 ' Law, in the Times nearer the Conquest, for our
 ' Kings to dispose of their Crowns as they thought fit,
 ' without Regard to Proximity of Blood; and their
 ' Method of doing this was by their last Wills and
 ' Testaments. p. 22. Let me grant this; for then
 ' I hope *le Roy le Veult* in Parliament is a better
 ' Will and more effectual than any other Wri-
 ' ting whatsoever. But be it by Will and Testa-
 ' ment, or by Statute, I am sure there is an End
 ' of that Unalienable and Indefeasible Hereditary
 ' Right, which has been the Word given to de-
 ' prive us of all our English Birthrights.

' Some honest People, upon reading this stately
 ' Volume of Hereditary Right, began to shake
 ' their Heads, and to think it a Manifesto of the
 ' Preten-

' Pretender's coming in. But for my Part, I think
 ' it only a forward foolish Step taken at a wrong
 ' Time. I have met with an Account of all the
 ' Plots and Conspiracies since the Reformation;
 ' and I have always observed, that the happy Disco-
 ' very and Prevention of them has been owing, for
 ' the most Part, to a Presumption and Confidence
 ' of Success among the Parties concerned in them.
 ' They have been too full of their Design, not able
 ' to contain it, and so their Opening too soon has
 ' spoil'd the whole Plot. I apply this to the *Jacobites*
 ' and *Papists* who are for the *Pretender*. What
 ' they may do by Silence and secret Reserves, I
 ' know not; but their open Confessions and De-
 ' mands in Print, are yet too early for any Thing
 ' but to betray themselves, and to put the Govern-
 ' ment and Nation upon their Guard against them.
 ' In my Opinion, it had been wiser in them to have
 ' kept their *Affertions* and *Queries*, as their Mother
 ' Church has done the Scriptures, suppressed and
 ' concealed from the People; for if they are read
 ' and understood, they do but rise up in Judgment
 ' against the Publishers thereof. I would only de-
 ' sire any sensible Man to read over this *Affertion of*
 ' *the Hereditary Right of the Crown of England*, and
 ' see what Mazes and Confusions the Author runs
 ' into, till in Effect he comes back into our present
 ' Settlement, *An Hereditary Right, tho' not in*
 ' *Proximity of Blood; any next Heir to be kept out of*
 ' *the Throne, upon manifest Inabilities for Govern-*
 ' *ment, &c.* which (granting all their other Preten-
 ' sions of Title to be true) is enough to prove Her
 ' Majesty's undoubted Right, and a legal Succession
 ' in the Illustrious House of *Hanover*. Let us not
 ' be run down by a noisy Faction, in their open De-
 ' fiance to the *Queen's* Hereditary Right, and to
 ' that of Her Protestant Successors, as limited by
 ' Law. It is a special Providence, that by taking
 ' the most solemn Oaths, our Consciences depend
 ' upon it; nay, our establish'd Church, the Pro-
 ' testant Interest in *Europe*, our Civil Rights and
 ' Liberties, the Well-being of our Posterity, eve-
 ' ry

‘ry thing that can be dear to a good Christian and
 ‘and an honest *Briton*. Our own Reason, our own
 ‘Conscience, can never fail us: If we seek our own
 ‘Ruine, it must be a judicial Infatuation upon us;
 ‘which I hope God will not send down, if we turn
 ‘unto him in Prayer to bless the *Queen* and spare
 ‘this People. Thus far Dr. Kennet.

By what has already been observed, the Readers may plainly see, in what flagrant and scandalous Manner the Asserters of *Hereditary Right* have misrepresented the *English Constitution*, and the *Fundamental Laws*, and falsify’d History: Let’s now cursorily examine how they have manag’d the *Scripture*.

They pretend, * that, in Dr. *Higden’s* Sense, * p. 24th
 our Saviour’s Resolution of the Case about paying 5th seqq.
Tribute to Cæsar, proves *Allegiance* to have been
 due to *Cromwell*; notwithstanding the Doctor’s
 fruitless Attempts to evade the Consequences. I am not
 (as I said before) much concern’d at any Cavils they
 can raise to wrest Dr. *Higden’s* Meaning, nor at any
 forc’d Conclusions they can draw from his Positions;
 for I hope the Doctor will, as, I’m sure, he’s able,
 to maintain what he has advanced: But I must take
 Notice, that in order to make out the Consequence
 they father upon the Doctor, they urge, that it is
 his avow’d Principle, that the Coining of Money
 is a certain Mark of Sovereignty; that whoever has
 that Power ought to be obey’d by our Saviour’s
 own express Precept and Doctrine; that this is a
 good Proof of *Cromwell’s* Divine Authority; and
 that therefore it will be hardly possible for the
 Doctor to prove *Cromwell* to have been an USER-
 PER. After this they examine *Hugo Grotius’s* Exposition
 of the Text about the Tribute: Render therefore to
 Cæsar the Things that are Cæsar’s; mention other
 different Expositions, which they say the Doctor
 has not refuted; and assert, that our Saviour
 does not always require the Jews to do more for
 Cæsar, than was consistent with the common
 Principles of Right and Justice; That the Fact on
 which Grotius’s Argument is founded seems plainly
 ‘ to

to be mistaken; that Grotius was not always of this Opinion, which would have been fatal to the Roman Empire, and engag'd the Romans to extirpate Christianity. That if it be a Christian Law, it is such as never had Authority in any Christian Nation; nor was it observed by S. Ambrose and the Christians of that time, with regard to Maximus, an Emperor de Facto, &c. Then they put the Question, whether the supposing the Tribute Money to have been coined by the Jews, that would not make our Saviour's Argument more intelligible? They offer next some Considerations that seem to favour this Conjecture; Consider another Conjecture, viz. That the Inscription of the Tribute-Money was Judæa Capta; and prove from the Roman Historians the Title of Tiberius: In short they play fast and loose with this Passage about Tribute-money, as nimbly as Jugglers do with their Balls and Counters.

I shall not follow them through all their Shifts and Doubles, but endeavour to hunt them down an easier way, that is by avoiding the Change and keeping to the true Scent. 'Tis an allow'd Maxim, that Scripture must be interpreted by Scripture; and that when any Obscurity appears in any Passage of the Holy Writ, it ought to be clear'd by the Parallel Passages: Now 'tis plain from the whole Tenor of the new Testament, That our SAVIOUR did no where Dictate Laws of Government; and 'tis no less evident, That in the particular Case now before us, in order to put by the Drift of an insidious Question, and silence the Pharisees, he commanded them to render Cæsar the things that were Cæsar's. That is, to yield Obedience or Submission, and to pay Homage and Tribute to Cæsar, that is to the known Sovereign, to the acknowledged standing Power.

That our SAVIOUR did not meddle with Titles of Princes, Rights of Nations, or Forms of Government, evidently appears from other concurring Passages. *My Kingdom is not of this World*, says he in one Place; but what's yet more pertinent to this Purpose, when one came and said

said to him, † *Master, speak to my Brother, that* † Luk.xil.
he divide the Inheritance with me. Did he not 13, 14.
 rebuke him, saying, *Man, who made me a Judge*
or a Divider among you? Now, if our SAVIOUR
 declined interposing in a private Family Con-
 cern, much less does it appear that he ever
 medled with *State Affairs*.

'Tis most certain, That both CHRIST, and
 His Apostles, made the *Laws of every particular*
Country the Measure of the Subjects Submission
and Obedience: And therefore all Arguments
 Drawn from the *New Testament*, in favour either
 of Passive-Obedience or *Hereditary Right*, are
 inconclusive and precarious. A Learned Bishop
 set this Matter in a True Light, some Years ago
 in a small Treatise call'd *The Thirteenth Chapter of*
the Romans, Vindicated from the abusive Senses put
upon it: Wherein having rightly supposed, That
 when the Epistle to the *Romans* was Written,
 there were as many different Governments in the
World, as there are at this Day: He afterwards
 invincibly proves, 'That the 13th Chapter to
 ' the *Romans* made no immediate Change of all,
 ' or any of the several Governments, but left
 ' them as it found them; Neither did it settle
 ' or fix any Government in such a Manner, as
 ' to make it unlawful for the *Legislative Power*
 ' (should it see fit) to change or alter it. That
 ' the said Chapter bids every Soul be Subject
 ' to the *Higher Powers*----- but it does not
 ' tell us, who those *Higher Powers* are: It lends
 ' us to the *Laws of the Constitution*, to learn
 ' where they are placed: And in short, That it
 ' requires of no People any more Submission to
 ' the *Higher Powers*, than the *Laws of their se-*
 ' veral Countries require." Now the 13th Chap-
 ter to the *Romans* being exactly parallel to the
 Passage about the *Tribute Money*, in Question:
 'Tis plain, that the Authors I contend with can
 draw no Benefit from all their Comments (on
 the Words *Render therefore Cæsar, the Things*

that are Cæsar's) in Favour of *Hereditary Right*.

And thus, if *I am not too partial to my Performance*, to use the favourite Phrase, of our Adversaries, I hope, I may be allow'd to say, That I have proved beyond Contradiction, That their *Pretended, Absolue HEREDITARY RIGHT has NO FOUNDATION*, either in LAW, HISTORY, or SCRIPTURE: Which was to be *demonstrated*.

I shall conclude these *Observations*, with those contain'd in a Letter, publish'd by the Ingenious Mr. Steele, in his Paper call'd the *English-Man*, of the 19th of November which is as follows:

To the ENGLISHMAN.

SIR,

IT has been represented as a malicious idle Report, to say, That the Nation is in any present Danger of Popery or the Pretender: And yet it is certain, that the Number of those who have these Apprehensions still encreases; which would make one suspect that this Danger has been growing every Day more and more visible. But I think now the Matter is past all Doubt, when the Pretender's Friends have the Boldness to justify his Claim in so pompous a Book as *The Hereditary Right of the Crown of England asserted*, &c. Instead of handing about Rehearsals, single Sheets, or small Libels, they openly arraign our present Constitution in a Volume in Folio, printed in a large Character and of a great Price: And this is publickly vended as a Standard to all that espouse hereditary indefeasible Right. The Author, it seems, reckons, that the Patrons of that Opinion are by this Time so seasoned in it, that they are ripe for the only true Consequences, he thinks, can be drawn from it. I shall not here enter into the main Controversy; I intend only to shew you, by a few Passages taken out of the Book,

how

how boldly and plainly he writes in Favour of the Pretender.

In the Introduction he begins with letting us know, That his Business is to confute the Arguments used in Defence of the late Revolution; and to shew that not so much as Submission to it, after it was made, was lawful. This is the Key of his whole Book, which he fairly owns at the Beginning of it; and by this you cannot fail to understand the Drift of the Passages I shall set down.

In Page 14, speaking of the Act recognizing King James I. he says, *Other Persons were then living of the Royal Family, but the next is declared to be the sole Heir. The Crown is appropriated to the next Heir of the Royal Family for ever. The Three Estates vow Obedience and Loyalty to the King and his Heirs by lineal Descent; they debar themselves and their Posterity from paying it to others. They devote their own Blood, the last Drop of it, and all the Blood of their Heirs, to maintain the lawful Succession against all Opposers: And to this eternal Duty they are bound by the Laws of God and Man.* And a little after: *If before this Act of Recognition there were Disputes about the Right of Succession, here they are ended: By this Passage it appears, that here was an End of the Distinctions made use of in Page 21, where he insinuates, That, first, there was anciently a Right in the Crown to put by the next Heir in the lineal Succession by Testament; and, secondly, That the Consent of the rightful Heir may convey his Right to another. These Distinctions are of use to him against Dr. Higden, but are by himself excluded after King James I.*

In Page 27, speaking in Justification of Edward the Confessor, whose Nephews by his elder Brother were abroad at the Time of his Accession, he has these Words; *Cases may be supposed of Princes, who for want of Power and Opportunity of doing Right to the lawful Heir,*

are forced to endure the Burthen of a Crown, which they would readily and gladly ease themselves of upon a proper Occasion. And a little after; It is not the bare Act of seizing and filling a Throne, but the Will of the Possessor, that must denominate him an Usurper. He that invades another's Right with an Intention to detain it from him, and a Resolution never to restore it to the true Proprietor, is certainly guilty of the highest Injustice: But if he accepts of a Crown only that he may secure it to the right Owner, and the better disappoint the Designs of his Enemies, most certainly he obliges him by an extraordinary Act of Friendship. This needs no Comment: It is visible what daring and traitorous Insinuations here are, and who are the Persons he has his Eye upon: I confess they have more Charity for him than I have, who think he means no Body but those in Edward's Days.

In Page 136, speaking of a *King de Facto*, (which he explains to be a King not having Hereditary Right) he says, *A King de Facto is not legally qualified to give a Commission to Judges, nor are Proceedings in his Courts of Judicature of any Authority. He cannot create a Nobleman, or make a Bishop----- All his Presentations to Benefices are voidable--- All Lands bestowed by him are resumable at the Pleasure of the rightful Successor.* And does he think his Game so sure that he dare threaten at this Rate? Is the Pretender's Coming so concerted, that no Alarms, tho' ever so terrible can prevent it? He goes yet farther.

In Page 139, speaking of Henry VI's Debt with relation to Calais, he observes; *Here is a national Debt contracted upon Parliament Security, (very probably for carrying on a War against France, as well as for the Payment of the Garrison of Calais) in Danger of being entirely defeated, had not Edward IV. at last by his royal Assent entitled it to a legal Payment.* And is the Loss of all the Funds, and the Ruin of the Publick Credit

dit of the present Government, a Threatning that will not awaken the Spirits of our Countrymen? Or can they be made believe, that the Pretender will confirm the Loans created on Purpose to keep him out?

In Page 170, he says, *If it should fall out, (as who can tell what may happen in a Country given to change) that a King de Jure should by Force or Violence dispossess a King de Facto, it may possibly at last be determined agreeably with the Opinion I have now delivered: And that he has told before was, That a King de Facto was an Usurper, and his Adherents Rebels and Traitors.*

And in Page 176, he threatens again with his usual Insolence: *Whenever the Heir shall recover his Right, there is no Law to shelter from his Resentments such as opposed his Claim, and lent their Assistance to his Enemies. Whoever took up Arms for him, or assisted him with Men and Money; the Soldiers that fought for him, the Divines that made it Gospel, the Lawyers that made it Law, are all involved in the Guilt of departing from their Allegiance-----* And this he pretends Dr. Higden allows.

These Passages are full of Insolence; he takes upon him to ridicule the Fickleness of his Countrymen, and their Weakness to resist an invading Force. If this does not rouse our Fury, to what a low State are we fallen? We were the Terror of Europe, and are we now the Scorn of a Writer against our Laws? Is our Courage fled beyond Sea with the Duke of Marlborough? Are our Benheims and Ramillies forgot? Or are our panick Fears of the French and Irish returned upon us? Shameful Effeminacy! But our Enemies may find, that our present Supineness is but the Couching of the English Lion after the Toils of Victory, that he may take Breath, and rouse more terrible when again provoked. But I must suspend my Indignation to give you the Author's finishing Stroke, in which he brings in Religion to support
and

'and crown his Plea. In Page 185 he says, *No Act*
 'of *Limitation* could ever yet effectually exclude the
 'next *Heir* by *Proximity of Blood*; but sooner, or
 'later, *Providence* has hitherto so ordered it, that
 'those who are first in the *Line of Descent* have at
 'length gained the *Crown*, notwithstanding all *Parli-*
 'amentary *Proceedings* to the contrary. And in Page
 '209. after having shewn, that *Henry VIII's Will*
 'was a good Will, and that the *Parliament* had
 'empowered him to declare his Successor in it, he
 'observes, That *King James I. ascended the Throne*
 'in *Opposition to several Acts of Parliament*. And
 'a little after he adds, So that, though in *Fact* it is
 'true, that several *Limitations of the Succession* have
 'been made in *Parliament*, and *Persons* who were in-
 'titled to the *Crown* by *Primogeniture and Blood*,
 'have thereby been excluded; yet it is also evident,
 'that no *Precedents* have hitherto been met with of
 'Parliamentary *Entails*, that have long prevailed a-
 'gainst those that claimed by *Common Law*. Now
 'this is the only *Observation* in the whole *Book*,
 'which, if it were true, would be of any *Force* to
 'convince *Men* of *Revolution-Principles*, who
 'think *Government* was first instituted for the
 'Good of the *People*, and is always to be model-
 'led as their *Safety* requires. Nothing can make
 'them change their *Mind*, but having it proved
 'that the *Laws of God* are against them: But this
 'our *Author* fails in so grossly, that it is the weakest
 'Part of a very weak *Book*. And this appears at
 'first *Sight* even in his own chief Instance of *Ed-*
 'ward IV's Family, compared with that of *Henry*
 'IV. Did not the *Three Henries* enjoy the *Crown*
 'for above 60 Years without Interruption? And
 'did not *Henry VI.* live to dispossess this *de Jure*
 'King *Edward*? And now if we take a *View* of
 'K. *Edward IV.* after a short *Reign* of 12 Years af-
 'ter his second Establishment on the *Throne*, were
 'not his sons butchered in the most tragical manner
 'of any recorded in our *History*? And though his
 'Daughter survived, did not her Husband, *Hen-*
 'ry VII. reign in Contempt of her Right, and
 'wholly

' wholly claiming from the Three *Henries*? But I
 ' should think it impious to pretend, as he does, to
 ' interpret the Ways of Providence, and the Causes
 ' of them. When our Author has made what use
 ' he can of the *English* History, he pretends the
 ' Scriptures are plainly on his Side. But here one
 ' would think, that while he is writing for a Popish
 ' Successor, he has forgot that the Bible is still in
 ' the Hands of the Laity among us. Do not we all
 ' know that the two Persons most distinguish'd by
 ' God's Favour were neither of them next Heirs in
 ' Blood? Was not *Jacob*, whose Name God chang-
 ' ed to *Israel*, and from whom he called his chosen
 ' People, was not he a younger Brother? And will
 ' he say, that the God of Justice blessed him be-
 ' cause he put a Trick upon his Father, and defrauded
 ' his Brother (See Pag. 239.) Do not the Scrip-
 ' tures tell us, it was because he loved *Jacob*, and
 ' hated *Esau*? And would the God of Justice have
 ' taken away the Hereditary Right to the Promise
 ' made to *Abraham*, if there had been any such
 ' Right in Nature? Was not *Salomon* declared by
 ' *David* his Successor in Exclusion of the next Heir
 ' by Blood? And did not God honour this Man
 ' more than any King that ever was in the World?
 ' And thus you may judge with what false Colours
 ' he would interpret the Scriptures in his Favour.
 ' And now, Sir, I believe you are satisfied of the
 ' Boldness of this Undertaking in Behalf of the Pre-
 ' tender to the Dominions of our Sovereign.

' It plainly appears from these Quotations, that
 ' the Author believes this whole Nation a People
 ' devoted one Day to the Indignation of an injured
 ' Sovereign; and that all Officers amongst us, both
 ' Ecclesiastical, Civil, and Military, in the Execu-
 ' tion of their several Duties, are acting what, in
 ' case of a Revolution, would attain their Blood,
 ' and could be no way defended by the Authority
 ' now in Being. The National Debts must owe their
 ' Validity to the Will of the Pretender, if he suc-
 ' ceeds; and this audacious Author thinks fit to glory
 ' in his present Expectations so far, as to make no
 ' scruple

' scruple of acknowledging, that Life, Limb, and
 ' Fortune of all Persons who have acted against his
 ' Interest are forfeited, and must be Objects of his
 ' Mercy, or Sacrifices to his Vengeance. I am told
 ' the unhappy Man who has writ this Treatise is a
 ' Non-juring Divine; lamentable is his Case, since
 ' he is to suffer in his Sense for the Testimony of a
 ' good Conscience: He is an Object of Pity; but
 ' certainly those who take Oaths to the Govern-
 ' ment, as Securities of their Fealty and Allegi-
 ' ance, and yet at the same time sap and undermine
 ' it, by favouring Doctrines inconsistent with its
 ' Establishment, are in the sight of Heaven in a
 ' much more woful Condition: Such unhappy Zea-
 ' lots as this Author are spirited into such Decla-
 ' rations as these by the Iniquity of these false Bre-
 ' thren, who abjure those they wish for, and swear
 ' to those they deny.

I am,

S I R,

Your most humble Servant,

Hannovero-Britannus.

F I N I S.

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